

AMERICA CARGO TRANSPORT, INC.

16300 Christensen Rd, Suite 203, Seattle, WA 98188

January 17, 2006

Director

VIA FAX

Commodity Procurement Policy & Analysis Division
Farm Service Agency
United States Department of Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attention: Mr. Richard Chavez

Re: 7 CFR Part 1496, Procurement of Commodities for Foreign Donation

Proposed Rule

Dear Mr. Chavez:

America Cargo Transport, Inc. requests a formal extension of 45 days of the comment period on this Proposed Rule from the current deadline of January 17, 2006. We believe that this Proposed Rule raises a number of complex and important considerations that could affect U.S.-flag shipping and cargoes available to the U.S. flag as prescribed under applicable, longstanding cargo preference law and policy. We need additional time to consider and respond to the proposed rules.

We join with other carriers and the American Maritime Congress to urge you to convene a working session as soon as possible with U.S.-flag ship operating companies as well as other affected parties in the maritime industry for the purpose of learning more and exchanging ideas about how your office envisages that this Proposed Rule would work, potential savings, its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws, as well as the vital American seafaring jobs that go with them, and other issues.

We thank you for your consideration of these requests and look forward to hearing from you as soon as possible.

Sincerely.

Kevin P. Callahan

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General Counsel



AMERICAN MARITIME CONGRESS

Franklin Square, 1300 I Street, NW, Suite 250 West, Washington, DC 20005-3314

January 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attention: Mr. Richard Chavez

Re: 7 CFR Part 1496, Procurement of Commodities for Foreign Donation

Proposed Rule

Dear Mr. Chavez:

Would you kindly note that the letter we sent earlier today requesting an extension of the comment period should list the Transportation Institute, which, like the American Maritime Congress and the Maritime Institute for Research and Industrial Development, is a Washington-based association representing U.S-flag ship operating companies in the international and domestic trades which transport commodities overseas under Title II of P.L. 480; the Food for Progress Act of 1985; and the McGovern-Dole International Food for Education and Child Nutrition Program.

Thank you for accepting this addendum as part of the record.

Sincerely,

Gloria Cataneo Tosi

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President

Phone: (202) 842-4900 Fax: (202) 842-3492





AMERICAN MARITIME CONGRESS

Franklin Square, 1300 I Street, NW, Suite 250 West, Washington, DC 20005-3314

January 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attention: Mr. Richard Chavez

Re: 7 CFR Part 1496, Procurement of Commodities for Foreign Donation

Proposed Rule

Dear Mr. Chavez:

On behalf of the American Maritime Congress, and the Maritime Institute for Research and Industrial Development, which are Washington-based associations representing U.S.-flag ship operating companies in the international and domestic trades, I am writing to request a formal extension of 45 days of the comment period on this Proposed Rule from the current deadline of January 17, 2006. Both we and our member companies believe that this Proposed Rule raises a number of complex and important considerations that could affect U.S.-flag shipping and cargoes available to the U.S. flag as prescribed under applicable, longstanding cargo preference law and policy. In addition, as I know you appreciate, these cargoes also have significant national defense implications because of their importance to ready, reliable sealift and crews for both U.S. Government-owned and dedicated private-sector capabilities.

I am also writing to request that your office convene a working session as soon as possible with our member U.S.-flag ship operating companies as well as other affected parties in the maritime industry for the purpose of learning more and exchanging ideas about how your office envisages that this Proposed Rule would work, potential savings, its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws, as well as the vital American seafaring jobs that go with them, and other issues.

We fully realize the importance of improving cargo delivery and reducing expenses where possible, consistent with cargo preference law and policy. We have, in fact, worked in the past to this end with USDA, USAID, MARAD, and other departments

Phone: (202) 842-4900 Fax: (202) 842-3492



and agencies as well. Thus, we view both our request for a 45-day comment period extension and a working session as an important opportunity for the kind of constructive engagement and partnership that has proven beneficial in the past and which we believe can also be obtained in the process of developing and finalizing this Proposed Rule, which could have a significant impact on the cargo preference laws.

We thank you for your consideration of these requests and look forward to hearing from you as soon as possible. My telephone number is 202-842-4900, ext. 301, if you need to reach me.

Sincerely yours,

Gloria Cataneo Tosi

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President

cc: Ms. Teresa C. Lasseter, USDA

Mr. Bert Farrish, USDA Ms. Denise Scherl, USAID

March 28, 2006

By Facsimile Transmission and By E-Mail

Mr. Richard Chavez
Commodity Procurement Policy & Analysis Division
Farm Service Agency
U.S. Department of Agriculture
1400 Independence Avenue, S.W., Room 5755-S
Washington, D.C. 20250-0512

Re: Notice of Proposed Rulemaking, 7 CFR Part 1496, RIN 0560-AH39 (70 Fed. Reg. 74717, December 16, 2005), Procurement of Commodities for Foreign Donation

Dear Mr. Chavez:

These comments are being submitted in response to the above described Notice of Proposed Rulemaking (NPRM). Although our submission is being filed after the deadline for comments (i.e. March 9, 2006), we hope that these comments can be made part of the docket in this proposed rulemaking.

The American Maritime Congress (AMC) is an association of U.S.-flag ship operating companies, with vessels in the domestic and international trades, and the Marine Engineers' Beneficial Association, our Nation's oldest maritime labor organization. Many of the vessels of these companies transport U.S. Government generated cargo, the carriage of which could be impacted by this proposed rule.

AMC has long played a significant role as a maritime industry coordinator on all aspects of various cargo preference laws, such as that within the purview of this NPRM. In this process, it has worked closely with maritime industry representatives as a coalition builder, with U.S. Government departments and agencies, with Members of Congress, and with representatives of other affected industries, such as agriculture commodity and processing groups and private voluntary organizations.

In this role, AMC has been guided by several general principles. All are relevant in the case at hand.

Proposed legal, regulatory, or administrative changes should be consistent with the letter, spirit, and intent of cargo preference law and not result in reductions in cargo for U.S.-flag

vessels. Such cargo is vital to preserving the U.S.-flag fleet on the sealanes of the world and thus to the economic and military security of the United States. Given the on-going War on Terror and the integration of the U.S.-flag fleet, its intermodal systems, and its American merchant mariners into national defense planning and sealift force projection, this U.S.-flag fleet role is more important than at any time since World War II.

AMC and its member companies support measures to improve the application of U.S.-flag cargo preference law and make it more efficient, flexible, "user-friendly," and up-to-date to account for changing circumstances and commercial practices. The "one-bid" principle is one of these, and we support it. AMC strongly believes that – rather than a "zero-sum" result – both objectives, improvements and continued provision of cargo for U.S.-flag vessels, can be accomplished together.

Success in this undertaking is most likely when it results from a constructive, cooperative effort that involves all affected parties, public and private sector, and that incorporates and melds the concerns and suggestions of these parties into an outcome in which at the end all involved have a positive stake.

With these general principles in mind, we have four key comments we would like to make concerning this NPRM. We are not providing any specific recommendations regarding operational details, because, as we note below, it would be premature to do so given the absence of detailed information in the NPRM and given that a number of U.S.-flag ship operators have already cited several areas where changes in current practice could have significant effect.

Our <u>first</u> comment is that this NPRM does not provide sufficient information concerning the revised procurement procedures to gauge their potential impact and thus the opportunity for the public to provide the "meaningful and informed comment" that is mandated by law. This point has been made, and justified in substantial detail, by others, and we agree with them. We would only add that this lack of information is at odds with the Commodity Credit Corporation's stated objectives, "to add clarity to the commodity bid evaluation process" or that "specificity is desirable."

Second, the NPRM states that, "under such a system, the cargo preference requirements would be determined initially and not subject to a change of carriers. This should reduce the ocean freight costs considerably because the tonnage would be consolidated by the carriers' bids and by allowing lowest-landed cost and cargo preference requirements to determine the U.S. delivery points." The NPRM, however, does not state these requirements, how they will be applied, or how compliance will be determined. Given the importance of cargo preference to our industry and to national security, and given that the details concerning the application of cargo preference and determination of compliance affect all carriers significantly and various carriers differently, it is important that the opacity in the NPRM be rectified before publication of the Final Rule.

The NPRM also states that "The Corporating Sponsor would be required to book freight at the rate KCCO used for the lowest-landed cost determinations, or a lower rate, except in circumstances where, in the opinion of the Contracting Officer and the applicable programs

agency's representative, extenuating circumstances. . . preclude such awards, or efficiencies and cost-savings lead to the use of different types of ocean service . . ."

We agree that such flexibility should be retained, but it should be circumscribed by clear limits to preclude "gaming" the system to avoid cargo preference or to provide unfair commercial advantage through the use of this flexibility. This is another example of the importance of the need for more information and specificity than is currently in the NPRM.

<u>Third</u>, the NPRM should be part of an effort that looks at the totality of cargo preference requirements and the procurement of commodities for donation overseas, a point also made by a number of others. The need for this was apparent to the Congress even in 1970, and it was stated more recently in 1999 by USAID in the following comments to the Maritime Administration (MARAD):

These issues have been addressed agency by agency on an *ad hoc*, rather than a comprehensive basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.

Fourth, the previous three lead to our final comment – the importance of the effort represented in this NPRM, as well as the Freight Bid Entry System (FBES), being part of a broad, cooperative, and constructive effort that involves affected U.S. Government agencies and private-sector entities. That MARAD and affected private-sector entities, such as those in the maritime industry, should be a meaningful part of this process is, we believe, a matter of law, not choice. However, even if this were not so, it would be reasonable to do so, or, as one comment on the NPRM notes, "good business and prudent policy."

To this end, we want to thank the CCC for providing this opportunity to comment, and we hope that our comments can be accepted late. We also wish to thank you for extending the original comment period at the request of ourselves and others, and for the public meeting held on February 21, 2006 at the Department of Agriculture. We urge that this be just the start of the inclusive cooperative effort we recommend above and that we so strongly believe can produce a constructive, comprehensive set of changes to increase efficiency, reduce costs, and above all, provide American food aid to those in need around the globe.

We stand ready, as does our entire industry, to be a part of such an important effort.

Sincerely yours,

Gloria Cataneo Tosi President

January 9, 2006

BY HAND DELIVERY

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of Agriculture
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

BY FAX AND E-MAIL

Mr. Richard Chavez

United States Department of Agriculture

Fax: (202) 690-2221

E-mail: Richard.Chavez@USDA.gov

Re: Procurement of Commodities for Foreign

Donation

7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

This letter is being submitted by American President Lines, Ltd., CP Ships USA, LLC, and Maersk Sealand (a) to request an extension of <u>at least</u> 45 days of the dates for comment in the above-referenced Docket established in the Commodity Credit Corporation ("CCC") Notice of Proposed Rule set out in the December 16, 2005 Federal Register (70 Fed. Reg. 74717) and (b) to protest the highly irregular procedures leading to and established in that notice. The signators to this letter are all ocean carriers operating U.S.-flag vessels providing international transportation services, including the carriage of food aid cargo which is the subject of the proposed rule.

1. We note at the outset that the proposed rule has the potential for major impacts on all participants in the U.S. Government food aid programs – not only the commodity suppliers and the carriers participating in the food programs, but also the ports through which the food aid is shipped abroad, the commercial interests at those ports such as terminals, transloaders, and

stevedores, and the railroads which move the commodities from the mills across country to the ports of exit. In and of itself this would mandate materially more time than the hypothetical 32 days for comment provided by the December 16, 2005 notice if meaningful and informed comment is to be available from all affected interests. In this regard, we characterize the notice period specified in the *Federal Register* notice as "hypothetical" because, coming as it did immediately prior to the Christmas and New Year's holidays, many interested parties will have been deprived of practical notice, or the practical ability to take advantage of that notice, during the holiday period.

2. There can be no legitimate reason for the truncated notice period specified in CCC's Federal Register notice. Executive Order 12866 of September 30, 1993 (58 Fed. Reg. 51735), to which the CCC refers (70 Fed. Reg. at 74719), states (Section 6(a)):

"* * each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of <u>not less</u> than 60 days." (Emphasis supplied.)

CCC's notice provides no explanation of why a shorter notice period was specified as to the proposed rule. Indeed, as the *Federal Register* notice explicitly acknowledges, the existing procedure that CCC proposes to change "has been in place for many years." (70 Fed. Reg. at 74718). Moreover, although it is common knowledge that CCC has been exploring the option of a departure from existing procedures, CCC has provided no formal, prior notice of its intention to publish a proposed rule amending its existing regulations applicable to the procurement procedures. The proposed rule is nowhere identified in the Department of Agriculture's semi-annual regulatory agenda as published in the October 31, 2005 Federal Register (70 Fed. Reg. 64308) or as published on May 16, 2005 (70 Fed. Reg. 26583).

3. The issues raised by the proposed rule are materially complicated by the fact that the CCC procedures do not exist in a vacuum, but exist alongside and must be considered in conjunction with other statutory and regulatory requirements. The Cargo Preference Act of 1954 requires that (46 USC App. 1241(b)(2)):

"Every department or agency having responsibility under this subsection shall administer its programs with respect to this subsection under regulations issued by the Secretary of Transportation."

The CCC's Federal Register notice identifies that the Cargo Preference Act has significant implications to the CCC procurement process (see 70 Fed. Reg. 74718) but entirely fails to address those implications. Indeed, we understand that the Maritime Administration, which is

January 9, 2006 Page 3

the delegatee of the Secretary of Transportation under the Cargo Preference Act, was not consulted prior to CCC's publication of the proposed rule.

4. Further unexplained confusion is created by the references in the *Federal Register* Notice to the possible use of alternative procurement procedures (70 *Fed. Reg.* 74719), which are nowhere identified in the proposed rule itself.

In sum, the proposed rule is important, has broad implications to all private interests participating in the food aid programs, can only be considered in the context of other, associated regulatory regimes, and this requires the opportunity for thoughtful comment which cannot reasonably be provided absent the requested extension of the comment period.

Respectfully,

Charles E. Boggs Vice President, Humanitarian Aid American President Lines, Ltd. James G. Dorrian Director Government Marketing Maersk Sealand

Charles B. Weymouth Director Government Affairs CP Ships USA, LLC

Robert T. Basseches 202.346.4201 rbasseches@ goodwinprocter.com Goodwin Procter LLP Counsellors at Law 901 New York Avenue, N.W. Washington, D.C. 20001

T: 202.346.4000 F: 202.346.4444

March 9, 2006

Director

(mail address)

Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of Agriculture
1400 Independence Avenue, SW
Room 5755-S
Washington, DC 20250-0512

Richard.Chavez@USDA.gov

(e-mail address)

Re: Procurement of Commodities For Foreign Donation, 72 CFR Part 1496, RIN 0650-AH39

Enclosed for filing in the above-referenced matter are the Comments of American President Lines, Ltd., CP Ships USA, LLC and Maersk Line and the exhibits thereto.

Sincerely yours,

Robert T. Basseches

RTB:nnv Enclosure

cc:

Charles E. Boggs (by e-mail) Charles B. Weymouth (by e-mail) James G. Dorrian (by e-mail)

Department of Agriculture Commodity Credit Corporation

Procurement of Commodities For Foreign Donation 72 CFR Part 1496 RIN 0650-AH39

Comments of American President Lines, Ltd., CP Ships USA, LLC and Maersk Line

These Comments addressed to the above-identified Proposed Rule are submitted by American President Lines, Ltd., CP Ships USA, LLC and Maersk Line (collectively referenced herein as "APL/CPS/ML"), pursuant to the *Federal Register* notice of December 16, 2005 (70 Fed. Reg. 74717) as amended by *Federal Register* notice of January 23, 2006 (71 Fed. Reg. 3442). In brief, while APL/CPS/ML support the Commodity Credit Corporation's ("CCC") stated objective of improving the efficiency of the procurement of commodities and ocean transportation services in support of the United States Government's humanitarian food aid programs, it is our position:

- (a) that as a procedural matter, the CCC notice does not provide an opportunity for informed or meaningful comment, *inter alia*, because that notice entirely fails to identify the operational details of the proposed, revised procurement procedures, with a resulting inability of relevant stakeholders to evaluate the impact of the proposed changes; and
- (b) that as a substantive matter, the proposed revised procurement procedures are significantly impacted by the numerous and longstanding unresolved uncertainties and disputes over the standards for award of ocean transportation contracts for carriage of humanitarian food

aid cargo, with the result that new bid evaluation procedures cannot appropriately be established in isolation from, and without consideration and resolution of those standards.

We address these issues below, after identifying APL/CPS/ML's important interest in the Proposed Rule.

A. APL/CPS/ML

APL, CP Ships, and Maersk Line operate 51 U.S.-flag liner vessels that routinely provide for the carriage of humanitarian food aid cargo – as well as provide service to commercial shippers and to U.S.-Government customers, including, in addition to the Department of Agriculture ("DOA") and USAID, the Department of Defense ("DOD"), the Department of State, and the U.S. Postal Service. Those vessels are state-of-the-art containerships, are supported by extensive, worldwide intermodal systems, are enrolled in the VISA (Voluntary Intermodal Sealift Agreement) program, and, as to 43 of the vessels, are participants in the Department of Defense/Maritime Administration ("MarAd") Maritime Security Fleet Program.

According to MarAd data, in 2004, APL, CPS and ML combined provided transportation on their U.S.-flag vessels for 48.7% of the packaged cargo moving on liner vessels pursuant to the humanitarian food aid programs (PL 480 Title I and II, Food for Progress, Section 416b and Food for Education) and 46.4% in 2005.

Given the extensive commitment of APL/CPS/ML to the humanitarian food aid programs, it is obvious that any proposed change in procedures that could affect their participation in the programs – including, particularly, the change of procedures being proposed in the current rulemaking – is of importance to them. Moreover, it is also of obvious importance to the U.S. Government entities that are responsible for the programs, as well as the other

Information provided by MarAd based on data available as of January 24, 2006. It includes food aid cargo moving via Great Lakes ports pursuant to Section 17 of the Maritime Security Act of 1996.

stakeholders that participate in and implement those programs. The level of APL/CPS/ML's participation in the programs demonstrates that their services are being provided on an efficient and cost-effective basis. Thus, any change in the procurement procedures that would impair APL/CPS/ML's ability to continue to provide those services would operate to the detriment not only of the APL/CPS/ML but also to the U.S. Government and the other stakeholders. While the *Federal Register* notice of the Proposed Rule provides no explanation of the methodological criteria that will implement the contemplated changes in the procurement processes, it identifies the expectation that the changes will significantly impact the many stakeholders participating in the multi-billion-dollar humanitarian food aid programs, including the U.S. port locations from which humanitarian food aid cargo will be shipped and the distribution of cargo among the carriers participating in the carriage of humanitarian food aid programs. [See 70 Fed. Reg. 74718]

B. The Context In Which The Proposed Rule Must Be Considered

CCC appears to believe it appropriate to depart from decades-long procedures for the procurement of commodities and ocean transportation services for those commodities, and to adopt new procedures, with no acknowledgement whatever of the complex and uncertain standards that govern the underlying award activities, with virtually no analysis of the potential implications of the revised procedures to the relevant stakeholders participating in the underlying programs, and indeed before the mechanism to implement the revised procedure has been finalized, tested and explained to interested stakeholders, including, we understand, MarAd.

The Proposed Rule would amend 7 C.F.R. §1496.1, to define "the policies, procedures and requirements" governing the procurement of donated agricultural commodities "under Title II of the Agricultural Trade Development and Assistance Act of 1954 (P.L. 480); the Food

for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other program under which CCC is authorized to provide agriculture commodities for assistance overseas." Although not specifically listed, we assume the Proposed Rule is also intended to cover donations under Section 416 of the Agricultural Act of 1949.²

Two government departments or agencies, in addition to CCC, have important and overlapping responsibilities for the effective implementation of these programs – USAID with respect to Title II, and MarAd with respect to all of the identified programs by virtue of MarAd's responsibilities under the Cargo Preference Act of 1954 (46 USC App. 1241(b)) and the Food Security Act of 1985 (46 USC App. 1241f). All three agencies have regulations addressed to the administration of these programs.³ For the most part, however, those regulations have not been materially updated to reflect the dramatic changes in the ocean transportation environment that have evolved since the regulations were initially adopted, or to resolve the many ambiguities over the implementation of the programs that have been a recurring source of conflict and uncertainty.

Those ambiguities and conflicts, of course, are longstanding. In 1970, Congress amended the Cargo Preference Act to vest the Secretary of Transportation with authority to adopt regulations to govern the manner in which the departments and agencies responsible for, *inter alia*, U.S. foreign aid comply with the U.S.-flag Cargo Preference requirements. This was considered essential because (S.Rept. No. 1080, 91st Cong., 2d Sess., pp. 58-59) (emphasis supplied):

"Although the cargo preference program is generally recognized as an important pillar of our maritime policy, its administration has

² Current Part 1496 in terms applies only to Title II, Pub. L. 480. See 7 CFR §1496.4.

³ 7 C.F.R. Parts 1496, 1499 (Commodity Credit Corporation); 22 C.F.R. Parts 201, 211 (USAID); 46 C.F.R. Part 381 (MarAd);

tended to be uneven and chaotic. A lack of uniform and rational administration has worked to the disadvantage of shippers, carriers, and various geographic areas of our nation, * * *."

It is of direct relevance to the legitimacy of the pending rulemaking that the clarity and uniformity of conditions that the 1970 legislation was designed to achieve have wholly failed to materialize. To the contrary, the administration of the humanitarian food aid programs as they relate to the procurement of ocean transportation continues *ad hoc*. Indeed, as we demonstrate below, the process is marked by recurring disputes between the responsible government agencies that leave the private stakeholders – and the agencies themselves – uncertain of and in dispute over the ground rules that apply. The following are but a few examples of the unresolved issues and unclear standards that prevail and that make the adoption of revised procurement procedures inappropriate until some semblance of clarity in the underlying ground rules is achieved.

- 1. In 1994, the Administrator of the Agricultural Stabilization and Conservation Service and the Maritime Administration engaged in a very public disagreement on the issue of whether, with respect to Title II, P.L. 480 cargo, lowest-landed-cost awards for U.S.-flag service should be prioritized based on service availability from an individual U.S. port or on a nationwide basis. (Copies of the correspondence are attached as Exhibits 1 and 2.)
- 2. The issue resurfaced in 1998, in litigation that was settled based on DOA's agreement, for purposes of the Food for Progress and Section 416(b) programs only, to make its awards based on a prioritization of U.S.-flag service on a nationwide basis. (A copy of the Settlement Order in Farrell Lines Incorporated v. U.S. Dept. of Agriculture, Civil Action 98CV02046 (D. D.C.) is attached as Exhibit 3.) As a result, pending further clarification, FAS awards for Title II purposes can be based on U.S.-flag offerings at a port or point, and for the Food for Progress and Section 416(b) programs on a nationwide basis.

3. In 1999, MarAd issued an advance notice of a proposed rulemaking respecting issues addressed to the application of the cargo preference laws to the humanitarian food aid programs. Docket No. MarAd-99-5038, 64 Fed. Reg. 4382 (Jan. 28, 1999). Among the issues addressed in the ANPRM were (i) the assignment of priorities when U.S.-flag vessels utilized foreign-flag feeder vessels part way; (ii) the definition of vessel type for purposes of the Cargo Preference Act's requirement that the U.S.-flag preference be "computed separately" according to vessel type; and (iii) the definition of the commercial terms underlying the commodity purchase transactions – e.g., FAS⁴ – all of which impact on the lowest-landed-cost evaluation. While the rulemaking did not progress beyond the ANPR stage, comments filed by USAID addressed to the MarAd notice provide clear demonstration of the confused standards that govern food aid awards:⁵

"USAID commends MarAd for starting the much-needed process of regulatory reform. However, we are disappointed that MARAD has not taken this opportunity to fully vet the issue of Cargo Preference Compliance. * * * Many issues have arisen over the years as the result of a changing maritime industry or changing federal programs. These issues have been addressed agency by agency on an ad hoc, rather than a comprehensive, basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.

We recommend that MARAD conduct a review of this array of past practices, policies, regulations and legal guidance to determine what is appropriate in view of the changing maritime industry and federal programs."

The application of FAS terms in determining lowest landed cost determinations is the subject of disagreement, as illustrated by the reference by the MarAd Director of the Office of Cargo Preference to CCC's "improper FAS use" in a May, 2005 presentation at the annual Food Aid Conference. See Exhibit 4.

April 28, 1999 Comments of Chief, USAID Transportation and Commodity Division, Office of Procurement, Exhibit 5 hereto (emphasis supplied).

It is no small irony that these criticisms by USAID addressed to the relevant regulatory environment at MarAd were very recently echoed by USAID with respect to its <u>own</u> administration of the Title II program. USAID recently reported to Congress that:⁶

"Basic regulatory guidance for Title II is outdated and needs to be updated. The lack of updated regulations causes reliance on "ad hoc" interpretations, a long outdated Handbook, and internal memoranda, emails and notes that are not codified, sometimes inconsistent, and occasionally forgotten."

4. One issue identified in MarAd's 1999 ANPR came to a head in a 2001 District Court action initiated by Victory Maritime Inc. against USAID, DOA and MarAd, challenging the allocation of cargo moving under the Title II program to foreign-flag liner vessels when the participation of U.S.-flag liner vessels was below the statutory minimum. Among the issues in dispute in the litigation was how the "computed separately" requirement of the Cargo Preference Act should be administered, and how the statutorily prescribed categories – liner, dry bulk and tanker – should be defined. The case has relevance not only with respect to the substantive issues in dispute but is further indication of the state of uncertainty as to the prevailing ground rules respecting the procurement procedures applicable to the humanitarian food-aid programs and as to the application of the cargo-preference requirements to those programs. This uncertainty is graphically identified in a series of motions by which the United States Department of Justice sought extensions of time to respond to the Victory Maritime complaint, explaining that:⁷

Final Report Submitted to the Congress by The United States Agency for International Development, Streamlining The PL 480 Title II Program (July 31, 2003) at pages 8, 10 (emphasis supplied). In its earlier Interim Report to Congress (March 31, 2003), USAID identified that "the procedures used by the U.S. Department of Agriculture in its management of food and activities are also very relevant" and that the "Title II streamlining effort must include the participation of Cooperating Sponsors, as well as critical business interests in the commodity, transportation and related support activities." (p. 4)

⁷ E.g., Consent Motion For Further Enlargement of Time and Statement of Points and Authorities In Support Thereof, August 20, 2001 (Exhibit 6 hereto) (emphasis supplied).

"This case, and the two related cases, concerns the interpretation of the Cargo Preference Act. The federal agencies which are the defendants in the litigation have admittedly not interpreted the statutory provisions at issue in a uniform manner.

The defendant agencies' differing interpretations of the Cargo Preference Act have been referred to appropriate officials at the Department of Justice, who are reviewing the matter with a view toward resolving the conflict so that there will be a unitary position of the United States with respect to plaintiffs' claims."

5. For the last several years MarAd has continued its efforts to update its regulations to clarify the application of the Cargo Preference Act to the food-aid programs, including the standards for awards underlying the lowest-landed cost determination to be applied by USAID and DOA in implementing procurements. Those efforts have failed. The widely circulated rumor that the failure was due to DOA and USAID opposition before OMB appears confirmed by a January 8, 2004 e-mail from MarAd's Director, Office of Cargo Preference to a number of interested, private parties, stating (the email is attached as Exhibit 7) (emphasis supplied):⁸

"As you know, we are continuing our efforts to update the cargo preference regulations. The proposed regulations are at OMB for clearance prior to publishing them for public comment. AID and USDA are requesting many changes to the proposal before we request public comment."

6. These same interagency conflicts continue under DOA's current rulemaking. It is common knowledge that MarAd has been excluded from participating in the development of the architecture for the planned revised procurement procedure, that it was not given prior notice of the publication of the proposed rule, and that it is only through its direct protest to OMB that,

Other outstanding issues that affect lowest-landed-cost determinations applicable to both commodity and carrier awards include, *inter alia*: service criteria to insure carrier performance capability; vessel classification standards to comply with statutory "computed separately" requirement; application of waterborne first-lift criteria; implementation of the ship U.S.-flag first objective; "fair and reasonable" rate methodology; methodology to be used in conjunction with Section 17 evaluation; standards for non-availability determinations; rate structure criteria.

very much after the fact, it has been given a seat at the table where the revised procurement procedures are being developed.

C. CCC Cannot Adopt New Procurement
Procedures Until the Relevant Standards
Governing the Procurements Have Been
Clarified

In response to the December 16, 2005 Federal Register notice, CCC received a large number of expressions of concern, incident to requests for an extension of the highly truncated time to comment on the Proposed Rule established in CCC's notice. These came from all areas of interested parties including commodity suppliers, port authorities, and the major trade associations representing U.S.-ship operating companies in addition to a number of individual carriers. The position articulated in these filings was direct and consistent, namely, that the new procedures being proposed by CCC have the potential to materially and adversely impact on the responding entities and that information as to the proposed procedures is too limited to permit interested parties to perform an informed evaluation for comment on the Proposed Rule:

- The January 9, 2006 joint filing on behalf of the American Maritime Congress,

 Transportation Institute, and Maritime Institute for Research and Industrial Development, for example, urged a joint meeting between CCC and affected maritime interests "for the purpose of learning more and exchanging ideas about how your [the Commodity Procurement Policy & Analysis Division] office envisages that this Proposed Rule would work, potential savings, and its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws

- Noting that "the conceptual and programmatic systems to accomplish this [the Proposed Rule's] goal remain work-in-progress at this writing," Sealift (filing of January 9, 2006) identified its "genuine concerns about whether the contemplated system can accommodate the

commercial realities of the current bid system * * *," and suggested that the opportunity for comment on the proposed rule be postponed until the system was more fully developed and vetted.

Liberty (filing of January 6, 2006) stated the position that a revision of the longstanding procedures should be undertaken only "with careful consideration of the consequences and effects," identifying, moreover, that:

"the affected regulation is only a piece in a much broader and complicated mosaic of statutes and regulations. Most of the underlying food-aid programs have been in existence for more than 50 years. There are also overlapping laws and regulations more directly affecting ocean transportation providers. Some of those considerations emanate from laws not administered by USDA. We urge USDA to pause to be sure that as many complications as possible are considered."

- American Cargo Transport (filing of January 17, 2006) emphasized the need "of learning more * * * about how * * * this Proposed Rule would work * * *."
- Didion Milling expressed concerns about "proposed changes that may effect the port allocations and selection of the carrier" and that "may permit the return of negative business practices * * *."
- Transfer Logistics, in written comments presented at a public meeting conducted by CCC on February 21, 2006, expressed its reluctance:

"to sit by and watch a change in procedure without a full and open disclosure of the process. Such a full and open disclosure would need to provide a mechanism such that all interested parties including relevant Government Agencies, Commodity Suppliers, Ocean Carriers and Port Facilities would have the opportunity to weigh in their concerns and then see the exact procedures that will be used to determine bid awards under a new system."

* * * * *

At least two clear themes characterize the context of CCC's proposed rulemaking. The first, which emerges from the private-party filings in this docket, is that the opportunity of interested parties to make meaningful comment addressed to the substance of the Proposed Rule does not currently exist given the void of information as to how the procurement mechanism will be structured and, more generally, the profound uncertainty as to the standards that will be employed under the procurement mechanism. We show in Part 1 below that CCC is required to clarify the issues and place them squarely before the affected parties so that they can meaningfully participate in this rulemaking.

We address in Part 2 below the related and equally obvious theme in this rulemaking context that the regulatory regimes governing the procurement of humanitarian aid cargo, and the application of the Cargo Preference laws to those programs, are not only incomplete and out-of-date but are the subject of vigorous disagreement *among the affected agencies themselves*. Indeed, the lack of clarity regarding what changes are being proposed by CCC, and thus how the interests of the various stakeholders will be impacted by those changes, is exacerbated by these interagency conflicts. As we explain, interagency coordination in this important rulemaking is necessary to identify and dispel the substantive uncertainties and to address the interagency conflicts that have far too long characterized the food-aid programs. We also show that such coordination is in any event compelled by the enabling statutes themselves.

1. <u>Substantive Clarity</u>. An essential element of APA Notice and Comment procedure is that interested persons shall be given "an opportunity to participate in the rulemaking through submission of written data, views or arguments * * *." 5 U.S.C. §553(c). The APA likewise commands that "notice of proposed rule making shall include . . . either the terms or

As identified *infra*, notice and comment is also required under the Agricultural Trade Development and Assistance Act of 1954 with respect to guidelines to be issued under that statute.

substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). It is self evident that the opportunity to participate must be more than mere tokenism; specifically, "[n]otice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment . . . "10 Under that standard, a final rule will be invalidated if, compared to the notice proposing it to the public, would-be commenters are only provided "their first occasion to offer new and different criticisms which the agency might find convincing" at a time when it is too late for the agency to consider their comments.

This important limitation on agency action is drawn sharply into focus by CCC's proposal to superimpose its rule upon what one commenter (Liberty) aptly described as a "much broader and complicated mosaic of statutes and regulations" – one that USAID itself called a patchwork of "ad hoc' interpretations, a long outdated Handbook, and internal memoranda, emails and notes that are not codified, sometimes inconsistent, and occasionally forgotten."

The problem here is that unless and until CCC explains how the proposed rule "would work ... [or] its effect on U.S.-flag liner and bulk carriers and compliance with the cargo preference laws,"

the right of the stakeholders in the food-aid procurement process meaningfully to participate in the rulemaking is irretrievably lost.

This last comment in particular hints at another flaw in this rulemaking process because it underscores the complex interrelationship between CCC's proposed rule and others touching the

American Medical Ass'n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995). See also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("th[e] right to be heard has little reality or worth unless one is informed," and thus a constitutionally proper "notice must be of such nature as reasonably to convey the required information").

Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1059 (D.C. Cir. 2000) (emphasis added).

See supra n.6.

January 9, 2006 comments in this docket of American Maritime Congress, Transportation Institute and Maritime Institute for Research and Industrial Development.

same subject matters. The specific flaw is that CCC cannot possibly satisfy its rulemaking obligations unless it first identifies the various conflicts that its proposed rule would engender vis-à-vis the regulations of other agencies – here, USAID and MarAd. As a panel of the D.C. Circuit broadly explained in *New York Shipping v. Federal Maritime Commission*:

"[A]n agency, faced with alternative methods of effectuating the policies of statutes it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime." 854 F.2d 1338, 1370 (D.C. Cir. 1988).

See also, e.g., Yukon-Kuskokwim Health Corporation v. NLRB, 234 F.3d 714, 718 (D.C. Cir. 2000) (NLRB violated its "obligation to address and to minimize conflict with another statutory regime").

For all of these reasons, the rulemaking cannot properly move forward until information is made available that permits interested persons an opportunity to properly understand the substance of what is being proposed in the rule.

2. <u>Coordination</u>. The statutes authorizing the CCC regulations on procurement of processed agricultural commodities for donation – *i.e.*, the Agricultural Trade Development and Assistance Act of 1954 ("ATDAA"), and the Merchant Marine Act of 1936 – require interagency coordination in the implementation of the humanitarian food-aid programs. The ATDAA, thus, mandates interagency coordination by "establish[ing] a Food Aid Consultative Group [consisting of various government agencies and affected private members¹⁴]... to review

The Group includes the USAID Administrator, the Under Secretary of Agriculture for Farm and Foreign Agricultural Services, the Inspector General of USAID, and representatives of private voluntary organizations, NGO's, and designated agricultural producer groups. *Id.* § 1725(b). Although MarAd is not made a member of the Group by the terms of the statute, the Merchant Marine Act of 1936 brings CCC under the MarAd regulations and establishes the centrality of MarAd to the food-aid-procurement process, as we explain in the next paragraph.

and address issues concerning the effectiveness of the regulations and procedures that govern food assistance programs " 7 U.S.C. § 1725(b). The provision further directs that proposed regulations – including those such as are the subject of these comments – be presented for consideration and comment by the Group. *Id.* § 1725(d). The Food Aid Consultative Group is thus a primary vehicle by which the various agencies with ATDAA responsibility (DOA/CCC and USAID) develop appropriate regulations to coordinate their various interests and responsibilities. Those provisions of ATDAA, accordingly, provide direct evidence of Congress's recognition that coordination among the affected agencies is indispensable to the rulemaking process for the multi-agency, multi-stakeholder U.S. food assistance programs.

That "legislative fact" is further evidenced by the Merchant Marine Act, which mandates that "[e]very department or agency having responsibility under this subsection [46 app. U.S.C. § 1241] shall administer its programs with respect to this subsection under regulations issued by the Secretary of Transportation." Because the CCC has responsibility under the Merchant Marine Act, the Act requires CCC to administer its procurement programs "under" MarAd regulations – and, by necessity, in coordination with MarAd.

Together, these provisions – one establishing the interagency Food Aid Consultative Group; another commanding that CCC "administer its programs under [MarAd] regulations" – place beyond dispute the fact that *coordination* among the affected agencies is an important aspect of the humanitarian food-aid programs. Moreover, coordination with the private stakeholders in the development of regulations applicable to the humanitarian food-aid program is itself statutorily compelled in the ATDAA, which explicitly requires that DOA "provide notice

¹⁵ 46 App. U.S.C. § 1241(b)(2) (emphasis supplied).

Id. ("[w]henever the United States shall procure... commodities... the appropriate agency or agencies [here, CCC as the procuring agency,] shall take such steps as may be necessary and practicable to assure" that certain prescribed minimum U.S.-flag carrier quotas are satisfied).

of the existence of a proposed guideline [which] * * * is available for review and comment, to eligible organizations that participate in programs under this subchapter, and to other interested persons." 7 U.S.C. § 1726a(b).

It follows that any failure by CCC to provide for interagency coordination in the proposed rulemaking risks invalidation under the APA's provision that "agency action, findings, and conclusions found to be . . . arbitrary and capricious" is unlawful and shall be set aside.

5 U.S.C. § 706(2)(A) (emphasis supplied); Motor Vehicle Mfrs. Ass'n of the United States v.

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (arbitrary-and-capricious standard requires agencies to consider "important aspect[s]" of a matter that they are addressing by agency action).

D. CONCLUSION

As we identified at the outset, APL/CPS/ML are fully supportive of the objective of improved efficiency and economy in the procurement of commodities and freight services to implement our Government's humanitarian food aid efforts. However, the Proposed Rule, at least at its current stage of development, does not provide any indication that it will achieve those results in a fair, orderly, or legally sustainable manner. For the reasons identified above, it would be improper for CCC to superimpose on the procurement process for commodities and ocean transportation a new set of rules without (i) plainly and fully identifying the terms and substance of its proposed rule, its operational relationship to related regulations of other agencies, and its affect on the interests of the various stakeholders in the food-aid procurement process, thus providing those stakeholders the opportunity for meaningful comment (which is currently lacking under the Proposed Rule as published); and (ii) coordinating with the two other affected agencies — USAID and MarAd — to update and clarify the underlying substantive

requirements.¹⁷ Only through such a process of participation, integration, and harmonization can CCC satisfy the multiple commands of the APA and of the statutes that authorize food-aid procurement, and appropriately address the interests of the multiple stakeholders affected by the food-aid procurement program.

Robert T. Basseches
Richard L. Matheny, III
Goodwin Procter, LLP
901 New York Avenue, NW
Washington, DC 20001
Of Counsel to American President
Lines, Ltd.

Respectfully submitted,

Charles E. Boggs

Vice President, Humanitarian Aid American President Lines, Ltd.

Charles R. Arggs. @

Charles B. Weymouth

Director Government Affairs

CP Ships USA, LLC

James G. Dorrian

Director Government Marketing

Maersk Line

March 9, 2006

[&]quot;Where overlapping or related jurisdiction exists, it is clearly essential that the agencies involved consult with one another at the earliest possible stage in the rulemaking proceedings.... Whether coordination is legally required [by statute] or has been undertaken as a matter of agency discretion and good management, the agency's posture will be much better in relation to other agencies, the courts, and the public if interagency coordination and review begins early and continues throughout the rulemaking process." Jeffrey S. Lubbers, A Guide To Federal Agency Rulemaking, at 248-49 (3d ed. 1998).



of Transportation

Maritime Administration Administrator

400 Seventh Street, S.W. Washington, D.C. 20590

0 7 MAR 1994

Mr. Grant Buntrock Administrator Agricultural Stabilization and Conservation Service P.O. Box 2415 Washington, D.C. 20013

Dear Mr. Buntrock:

It has been called to our attention that the Agricultural Stabilization and Conservation Service's (ASCS) Kansas City Commodity Office (KCCO) issued an invitation to bid, Invitation 024, dated January 25, 1994, requesting ocean shipment of certain P.L. 480 Title II cargoes. The invitation specifies laydays during the period March 6, 1994, through April 15, 1994, and includes cargoes destined to numerous geographic areas throughout the world including India.

It appears that KCCO allocated 15,000 metric tons of cargo, based on lowest landed cost. destined to India via the U.S. ports of Tacoma, Washington, and Long Beach, California, that did not have direct U.S.-flag service. This cargo was fixed on U.S.-flag carriers (Sea-Land Service, Inc. and American President Lines) that provide service to India via foreign flag feeder service.

It is our understanding that this cargo should have been allocated to other ports(and fixed on U.S.-flag vessels that provide direct U.S.-flag carriage. Our position on this matter is founded on numerous decisions issued by the Comptroller General of the United States (copies enclosed) which reaffirm our requirement that priority be given to carriers providing all U.S.-flag service to destination ports prior to contracting for services providing U.S.-flag service utilizing foreign flag vessels to complete the delivery process. Based on the foregoing, we are unable to apply these voyages toward your agency's 75 percent U.S.-flag requirement and disclaim liability for any applicable ocean freight differential that may have been incurred.

Therefore, I am requesting that you carefully review the enclosed and ensure that future preference shipments are flagged first to U.S. carriers providing all U.S. service before fixing U.S. carriers utilizing foreign feeder service.

Should you need additional information, I will be happy to meet with you to discuss this matter.

Sincerely.

Herberger

Maritime Administrator



Agricultural Stabilization and Conservation Service P.O. Box 2415 Washington, D.C. 20013

MAR 3 1 1901

Mr. A. J. Herberger Administrator Maritime Administration U.S. Department of Transportation 400 Seventh Street, S.W. Washington, D.C. 20590

Dear Mr. Herberger:

Your letter contesting the manner in which the Commodity Credit Corporation (CCC) recently contracted for Title II, P.L. 480 commodity shipments to India has been reviewed. We are surprised by the Maritime Administration's (MARAD) objections to our policy as it relates to the prioritization of U.S.-flag service. The current CCC policy has been in effect for a number of years and is a policy that has been known and endorsed by MARAD. We disagree with your conclusions.

Our first point of disagreement is the point at which MARAD's prioritization of U.S.-flag shipping service must be considered. This hierarchy of prioritizing U.S.-flag shipping services is based upon the U.S. port of origin of the commodities. In the case of the shipments to India, the ports of origin were on the West Coast. As such, the U.S.-flag service with foreign flag feeder to destination was considered as qualifying under cargo preference since no other U.S.-flag carrier offered all U.S.-flag service to India from West Coast ports. This is consistent with the Comptroller General opinions enclosed with your letter and is reflected in the April 11, 1986, letter to this agency from MARAD (copy enclosed) that states in part:

"The only situation where a U.S.-flag with foreign flag relay offer is not considered valid U.S.-flag service under P.L. 664, is when such service is offered against all U.S.-flag service from the same origin port to the same destination port (Comptroller General Opinion B-145455). However, since no other U.S.-flag carrier can provide all U.S.-flag service from West Coast origins to destinations in India and Indonesia, APL's service is totally qualified as U.S.-flag service and we will record it as such under your program."

Our second point of disagreement is with your challenge to our long-standing policy regarding the procedure for commodity purchasing by suggesting that CCC must give priority to carriers providing all U.S.-flag service prior to contracting. In order to maximize the funds appropriated for programs such as Title II, P.L. 480, CCC contracts for commodities on the principle of the lowest landed cost. In the case of bagged, processed, or fortified commodities furnished for the Title II program, CCC is required by law to procure and allocate 50 percent of the commodities on the principle of lowest landed cost without regard to the country of documentation of the vessel. CCC is free to purchase the remaining 50 percent in the manner it deems appropriate. The procedures followed for Invitation 024 were consistent with our long-standing policy and the principles reflected in the City of Milwaukee v. Yeutter decision.

Finally, we are concerned that the MARAD position on this issue has not been properly analyzed to determine the impact on the different types of U.S.-flag service. We understand through conversations with other U.S.-flag carriers that they have not been consulted or advised on this change in MARAD's policy. In our view, if a change in the manner of prioritizing U.S.-flag service is contemplated by MARAD, the entire U.S.-flag shipping industry should be given the opportunity to respond. We believe this is necessary in view of the significance of this change and since the Comptroller General opinions do not seem to support the MARAD view.

We will continue our current policy of considering U.S.-flag service with a foreign flag feeder to destination as valid U.S.-flag service when all U.S.-flag service from the same origin port range is not available.

Sincerely,

Grant Buntrock Administrator

Frant Bartuck

Enclosure

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Farrell Lines Incorporated Plaintiff,	
v.	Civil Action No. 1:98CV02046 EGS FILED
United States Department of Agriculture et al. Defendants.	SEP 1 7.1998 NANCY MAYER-WHITTINGTON: CLERK U.S. DISTRICT COURT

ORDER

Upon consideration of the joint motion of Plaintiff and Federal Defendants for entry of an agreed order disposing of this action, and of the entire record and of the absence of any opposition thereto, it is by the court this day of September 1998:

ORDERED that defendant United States Department of Agriculture shall measure

compliance with the requirements of the cargo preference laws with respect to Food for Progress

and Section 416(b) programs on a country-by-country basis to the extent practicable and unless;

determined otherwise by the United States Department of Agriculture after consultation with

defendant Maritime Administration, or the cargo preference regulation or policy is duly revised.

by the Maritime Administration; such consultation as provided in the United States Department.

Agriculture with the defendant Maritime Administration prior to fixing cargo; and it is further

ORDERED that defendant United States Department of Agriculture with respect to the Food for Progress and Section 416(b) programs shall defer to the cargo preference priority policy of the Maritime Administration as now constituted, a copy of which is attached hereto, or as it may be duly revised by the Maritime Administration, the current policy provides that if an occurrent were to offer to carry cargo from a U.S.-port area overland on a F.A.S. basis or an intermodal basis to connect with its all U.S.-flag vessels, the service will be fully eligible to carry the cargo and will be recognized as a first priority service for the same type of service under the cargo preference laws under the Maritime Administration cargo preference priority rules as currently constituted; and it is further

ORDERED that the United States Department of Agriculture will expedite its consideration of plaintiff's pending claims in connection with shipments made under the Foods for Progress Program; and it is further

ORDERED that the action is dismissed with prejudice and each party shall bear its owns

United States District Judge



US Decoment of Tonsportured Maritime Administration

Prioritization of U.S.-Flag Shipping Services for Compliance With the Cargo Preference Requirements of the Cargo Preference Act of 1954

In order to set our simply the basic principles of prioritization of U.S.-Slag shipping requirements under the Cargo Preference Act of 1954 (Public Law 664), 46 U.S.C. 981, to meet the needs of the shipping community, the following general guidance has been prepared to summarize existing requirements under governing authorities. Requests for further information may be directed to this office. Our new telephone is (282) 366-4618.

The Maritime Administration's prioritization of U.S.-flagsacrace for cargo preference purposes is as follows:

- (1) The following all U.S.-flag vessel services have equal status in the selection by shippers of preference cargoes:
 - (a) U.S.-flag vessel service (U.S.-flag vessel with relay/transshipment to another U.S.-flag vessel to final discharge pert);
 - (b) Direct U.S.-flag vessels service:
 - (c) Intermodal services to the final destination or from the point or port of origin utilizing only U.S.-flag vessels for any water-borne portion.
- (2) In the event that all U.S.-flag vessel service es described in Paragraph (1) above is not available U.S.-flag vessels with relay or transshipment via a foreign-flag vessel to final discharge port is the acceptable and required U.S.-flag service under the statute.

Federal agencies and/or their program participants may not make determinations of non-availability without the Maritime Administration's concurrence of the criteria utilized.

We suggest that you also service Comptroller General Opinions of 3-145455 dated June 12, 1968, 3-148872 dated May 18, 1968, 3-145421, December 23, 1968, and 3-155185 dated November 17, 1969, as they relate specific cargo preference concepts relative to U.S.-flag vessel services.

Sincerely,

s. th

S. THOMAS ROMEO
Chief and Inter-Agency Lieuson
Division of National Cargo
Office of Market Development

Possible Win-Win Actions

- Implement Simplified FBES to save carrier entries & computer run times
 - Use Ex-works & Free Carrier terms for commodity purchasing
 - Get rid of improper FAS use
 - Use destination bidding
- Must incorporate all cargo preference requirements so computer makes booking decisions



ORIGINAL

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APR 28 1999

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

Docket Clerk, DOT Dockets Room PL-401 400 7th Street, SW Washington, D.C. 20950

?

Ref: Docket No. MARAD-99-5038—

The U.S. Agency for International Development (USAID) would like to take this opportunity to respond to the Maritime Administration (MARAD) advance notice of proposed rulemaking published in the Federal Register January 28, 1999.

USAID comments concern the scope of the rulemaking. USAID commends MARAD for starting the much-needed process of regulatory reform. However, we are disappointed that MARAD has not taken this opportunity to fully vet the issue of Cargo Preference compliance. We feel that it is imperative that any rule published by MARAD apply to all cargo and federal agencies and departments administering such cargo falling under the statute, not limited to agricultural exports. Many issues have arisen over the years as the result of a changing maritime industry or changing federal programs. These issues have been addressed agency by agency on an ad hoc, rather than a comprehensive, basis. We now have a web of Comptroller General Opinions, internal MARAD legal opinions and court decisions that interpret regulations that are no longer on point. Having rules, definitions or procedures that differ from one agency to another leads to confusion, misinterpretation and a sense of inequality.

We recommend that MARAD conduct a review of this array of past practices, policies, regulations and legal guidance to determine what is appropriate in view of the changing maritime industry and federal programs. We would like to see the new regulation address head on the reality of today's shipping industry and fleet. It should also be flexible enough to adapt to inevitable future changes in the shipping industry.

The difficulties for USAID's food aid programs are compounded by the fact that the Farm Bill of 1985 increased the required tonnage of food aid exports that must be shipped on U.S. flag vessels from 50 to 75 percent. This increased the burden on USAID to best utilize the diminishing U.S. fleet to carry the required tonnage. However, the issues themselves cut across the board to all types of cargo and to all agencies and departments administering such cargo. The central issues are the diminishment of and changes in type of service offered and the make-up of the U.S. fleet. The loss of break bulk liner service in the fleet has required us to use "bulk carrier" type vessels to move packaged goods. For years we have been forced to use tankers to move bulk agricultural products. Where once there

was abundant regular scheduled liner service to the non-traditional destinations, i.e., West Africa, there are now a very limited number of companies providing that service. In many cases there is only one U.S. carrier to any given destination. In order to meet cargo preference requirements we are forced to sacrifice some programmatic needs.

Before MARAD issues any proposed rule they should consider a few basic questions. First and foremost, what types of vessels are entitled to protection under the Cargo Preference Act as "necessary for the national defense and development of [U.S.] foreign and domestic commerce"? Should any agency or department be required to use inappropriate vessels because they are protected? What is commercially acceptable service for our programs, e.g., since U.S. flag/foreign feeder service is commercially accepted worldwide, should it not be considered as acceptable as all U.S.-flag service? How can programs subject to the Cargo Preference Act most economically utilize the U.S. fleet? Taking into consideration the different objectives of each agency and department and the programs they administer, what is the most flexible method of compliance with the Cargo Preference Act? USAID looks forward to meeting with MARAD to discuss these issues.

In the event that MARAD does not elect to widen the scope of the rule making and issues a proposed rule with the limited scope in your ANPR, we will address specific issues after the proposed rule is published. Note that even with the limited scope of the proposed rule we see this as a significant economical regulatory action and would expect MARAD to produce the appropriate economical study in accordance with E.O. 12866 to support the rule.

Singerely,

Robert M. Goldman, Chief Transportation and

Commodity Division
Office of Procurement

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GULFCOAST TRANSIT COMPANY,	.)
Plaintiff,))
v.) Civil Action No. 01-00768 RWR
BRUCE J. CARLTON, et al.,)
Defendants.))
•)

MOTION FOR FURTHER ENLARGEMENT OF TIME AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendants, by their undersigned attorneys and pursuant to Fed. R. Civ. P. 6(b), hereby move for a further enlargement of time, to and including September 17, 2001, within which to respond to plaintiff's complaint in this case. This motion is being filed to correct the error in the caption of the motion to this effect that was filed on August 17, 2001. In support of this motion, defendants state as follows:

- 1. Defendants' response to plaintiff's complaint is currently due on August 20, 2001.
- 2. This case, and the two related cases, concern the interpretation of the Cargo Preference Act. The federal agencies which are the defendants in the litigation have admittedly not interpreted the statutory provisions at issue in a uniform manner.
- 3. The defendant agencies' differing interpretations of the Cargo Preference Act have been referred to appropriate

officials at the Department of Justice, who are reviewing the matter with a view toward resolving the conflict so that there will be a unitary position of the United States with respect to plaintiff's claims. Because that review and coordination process has not yet been completed, defendants are requesting a further enlargement of time to respond to the complaint.

4. Counsel for the plaintiffs in this and the related cases have stated that their clients do not oppose the requested extension of time. Counsel for the proposed intervenors have also stated that they do not oppose the requested extension of time.

Therefore, in view of the foregoing and the entire record herein, defendants respectfully request that the Court grant this motion and extend the time for defendants' to respond to plaintiff's complaint to and including September 17, 2001. A proposed Order is attached.

Respectfully submitted,

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ROSCOE C. HOWARD, Jr., D.C. Bar #246470 United States Attorney

Mes. Lyc Fox

MARK E. MAGLE, D.C.Bar #416364 Assistant United States Attorney FRED E. HAYNES, D.C. Bar#165654
Assistant United States Attorney
555 4th Street, N.W., Room 10-445
Washington, D.C. 20001
(202) 514-7201

----Original Message----

From: Harrelson, Tom [mailto:Tom.Harrelson@marad.dot.gov]

Sent: Thursday, January 08, 2004 3:15 PM

To: PJS@libertymar.com (E-mail); John Raggio (E-mail); Kgaulden@Mllnet.Com (E-mail); Mensing, Eric; Jim Madden (E-mail); Jim Wachtel (E-mail); Charles Nolfo (E-mail); Fred Begendorf (E-mail); Alan Butchman (E-mail);

Steve Gill (E-mail); Joe Sanders (E-mail); Bryan Alix (E-mail); 'Cliff.Johnson@tecoenergy.com';

'scarmel@mllnet.com'; Kurz, R; MATSON-Garvin, Mike; 'georgec@redrivershipping.com'; 'jwhite@ahlsc.com';

Carleton, Bruce B; 'ceklofjr@k-sea.com'; 'rrsc@patriot.net'

Cc: Boggs, Charles E; Charles Weymouth (E-mail); Yarrington, Michael; Brennan, Dennis; 'bmcgale@mllnet.com'

Subject: Economic Impact of Regulation Change

Dear Colleague:

As you know, we are continuing our efforts to update the cargo preference regulations. The proposed regulations are at OMB for clearance prior to publishing them for public comment. AID and USDA are requesting many changes to the proposal before we request public comment. Primary among the requested changes are defining vessel type (liner, bulker, tanker) by the type of cargo carried rather than by the design of vessel. Historically, we have always defined the three types of vessels in the Act by construction design.

AID and USDA propose that any vessel-voyage that carries bagged cargo would be called a "liner" and any vessel that carries bulk cargo would be called a "bulker" while any vessel that carries bulk liquid cargo would be called a "tanker". There is no proposal yet on what to call a vessel-voyage carrying two different types of cargo or whether to score it as two vessel types for the same voyage. Scoring by cargo would have the effect of reducing the amount of cargo required on U.S-flag vessels since it would no longer require 75% by three different vessel types but merely 75% by cargo type. Also, it would introduce more competition into the bidding process. Both results should reduce the cost of cargo preference to AID/USDA but we do not know the impact on the U.S.-flag merchant marine and thus the overall long term impact on the American taxpayer.

OMB has asked MARAD and AID/USDA to determine the economic impact of changing from "design" to "cargo" for scoring purposes.

We would appreciate your input as to the potential impact on your US-flag operations if scoring were done by type of cargo rather than by type of vessel. Would you lose or gain vessels and crew? Would your bottom line be impacted up or down? Would your corporate viability be threatened or enhanced? Would there be no impact? Can you put the "guesstimate" of potential impact in dollar figures and number of vessels and crew on your responses?

Your soonest response is requested. Preferably by noon Monday.

Thanks, Tom

Department of Agriculture Commodity Credit Corporation

Procurement of Commodities For Foreign Donation 72 CFR Part 1496 RIN 0650-AH39

Further Comments of American President Lines, Ltd., CP Ships USA, LLC and Maersk Line

By Federal Register notice of April 7, 2006, (71 Fed. Reg. 17767) ("Notice"), the Commodity Credit Corporation ("CCC") announced two clarifying changes to the proposed rule in this docket first announced in the Federal Register of December 16, 2005 (70 Fed. Reg. 74717). In addition, CCC invited "respondents" to "provide information and data on the economic effects of the proposed adoption of a one-step procurement system on their business operations. * * * These comments should include data appropriate for economic analysis."

[at 71 Fed. Reg. 17767]

American President Lines, Ltd., CP Ships USA, LLC and Maersk Line (collectively referenced herein as "APL/CPS/ML") previously have filed comments in this docket (under date of March 9, 2006). We appreciate CCC's recognition in its current notice of the relevance, and importance, to the rulemaking of an evaluation of the economic impact of the proposed rule on the potentially affected stakeholders – identified by CCC in the April 7, 2006 Notice as "ocean carriers, commodity suppliers, ports, railroads and private relief agencies." With all respect, however, CCC's invitation for comments in its April 7, 2006 Notice strongly suggests that CCC has failed to pay serious attention to the comments that have <u>already</u> been filed in this docket. That is because the central theme of those comments is that information about the

implementation of the proposed rule is so lacking that potentially affected stakeholders are <u>unable</u> to make informed or meaningful substantive comment addressed to the proposed rule.

That position lies at the heart of the March 9, 2006 comments filed by APL/CPS/ML. We explained there that CCC's notice of the proposed rule failed to identify the operational detail of the revised procurement procedures, a circumstance that, alone, has caused the relevant stakeholders to lack the requisite understanding of the proposed rule to be in a position to evaluate the impact of the changes there contemplated. We also documented a representative sampling of the numerous, outstanding uncertainties and inter-agency disputes over the standards for award of ocean-transportation contracts for carriage of humanitarian food aid cargo – a context that furthers the confusion over the implications of the new procurement regime being proposed.

The position so stated by APL/CPS/ML in their March 9, 2006 comments is consistent with the position stated by the other commentators responding to CCC's proposed rulemaking. Indeed, with the exception of several *pro forma* filings, *e.g.*, by the North American Millers' Association and Catholic Relief Services, every commentator – spanning the spectrum of affected interests identified in the April 7, 2006 Notice – complained of the absence of a meaningful explanation of how the proposed procedures would be implemented:

(a) <u>Ports</u>. The Virginia Port Authority, for example, stated in its comments (dated March 7, 2006) that:

"We do not feel that this proposed rule change has been analyzed and/or explained in enough detail to allow the stakeholders in this business to assess the likely impact on their business level." (p. 1)

It recommended further analysis and testing of the proposed rule change, noting that:

"Only after such an analysis is completed, and the findings shared, can any port realistically measure the impact of the rule change."

Another major port, the Illinois International Port District (Chicago), stated a similar position in comments of March 3, 2006 that "wholeheartedly" endorsed the position previously taken by Transfer Logistics, Inc. at a public meeting conducted by CCC on February 21, 2006, where Transfer Logistics identified that it was "very concerned about the proposed rule changes" and objected to the "changes in procedure without a full and open disclosure of the process." (Transcript of February 21, 2006 meeting, at p. 30)

(b) <u>Carriers</u>. Carrier comments in the proposed rulemaking were filed (in addition to APL/CPS/ML) by or on behalf of Sealift, Inc., Liberty Maritime Corporation, Maybank Shipping Company, Inc., Teco Ocean Shipping, and Central Gulf Lines, Inc./Waterman Steamship Corporation.

Sealist stated the position (comments of March 9, 2006):

"[T]hat the information available to the industry on this proposal is so limited that we lack the requisite information to formulate comments." (p. 1)

It went on in its comments to particularize this position, making many of the points identified in the APL/CPS/ML filing.

Liberty complained that:

"[i]t is unclear as to how [the cargo preference] requirements would be applied, and the proposed rule does not provide any guidance and parameters. Liberty recommends that CCC explain how the cargo preference requirements will be applied and complied with before CCC proceeds to a final rule." (Comments of March 9, 2006, p. 3)

Liberty also identified that "[d]espite its importance" to the proposed rule, the Freight Bid Entry System ("FBES") "has, to date, been developed without significant industry input," and stated that "FBES is too important and significant a system to be developed, tested, adopted and implemented without the input of affected persons" – meaning formal notice and comment

procedures. In its December 17, 2005 Notice, CCC identified FBES as integral to the proposed rule (at 70 Fed. Reg. 74718).

Central Gulf/Waterman commented that they:

"are most concerned that the adoption and implementation of the proposed new procedures by the CCC may ignore applicable cargo preference laws and policies * * * the agency avoids any real discussion in the NPRM about the vital need to ensure that the adoption and implementation of new CCC procedures will comply [with those requirements]." (Comments of March 9, 2006, pp. 1-2)

Maybank, which filed comments on January 11, 2006 and supplemented those comments on March 8, 2006, stressed that, despite the fact that the proposed rule "has the potential to effect [sic] in a material way * * * U.S.-flag carriers," there is a total absence of transparency as to the interaction of the proposed rule and cargo preference mandates:

"policy issues arising out of legal mandates cannot be dismissed until they are identified and reviewed; this has not been accomplished." (Comments January 11, 2006, p. 1; March 8, p. 1)

See also Teco's concern, *inter alia*, about the "rush to implement the new computer one-step bid evaluation process * * *." (Comments, March 9, 2006)

(c) Other Stakeholders. In addition to the ports and carriers potentially affected by the proposed rule, other participants in the humanitarian food aid process filed comments identifying their uncertainty (and concerns) as to how the rule would impact upon them. We have already (p. 3) referenced the comments of Transfer Logistics, a major transloader at the ports of Chicago and Portsmouth, Virginia, which were essentially echoed in comments filed on March 2, 2006 by the Chicago SouthShore & South Bend Railroad. In addition, in comments filed on March 9, 2006, Muller Shipping Corporation – a forwarding agent – identified a number of respects relevant to cooperating sponsors in which the operation and effect of the proposed rule was uncertain.

We would have thought that the message undertaken to be conveyed in these prior filings could not be plainer: among other concerns addressed to the proposed rule is the concern that CCC has failed to provide potentially affected stakeholders sufficient information to understand how the rule will be implemented and how it will impact them. Nothing has occurred since the March 9, 2006 comment date, and there is nothing in the CCC notice of April 7, 2006, that remedies that critical omission. Interested parties are now no more in a position to provide meaningful "information and data on the economic effects of the proposed adoption of a one-step procurement system on their business operation" than they were when they filed comments two months ago expressing frustration about the total absence of clarity about the operational details of CCC's proposed rule.

It is obvious from the December 17, 2005 Notice that CCC anticipates significant impact on the relevant stakeholders if the proposed rule is implemented, including changes in the distribution of humanitarian food aid cargoes among carriers and ports. APL, CPS and ML are important contributors to the humanitarian food aid program: they currently carry almost 50% of the humanitarian food aid packaged cargo moving on liner vessels, reflecting the efficient and cost-effective service they provide. (See March 9, 2006 Comments, p. 2) Accordingly, we are anxious to comply with CCC's request, for the obvious reason that changes that redistribute cargo among carriers and ports have the potential to affect APL's, CPS' and/or ML's participation in the important humanitarian food aid programs. For the reasons identified above, however, CCC has failed to provide us, and the other participants in the programs, the means to do so. We urge CCC to remedy this condition.

Robert T. Basseches
Richard L. Matheny, III
Goodwin Procter, LLP
901 New York Avenue, NW
Washington, DC 20001
Of Counsel to American President
Lines, Ltd.

May 3, 2006

Respectfully submitted,

Charles E. foggs of

Charles E. Boggs

Vice President, Humanitarian Aid American President Lines, Ltd.

Charles B. Weymouth

Director Government Affairs CP Ships USA, LLC

James G. Dorrian

Director Government Marketing

Maersk Line

Chavez, Richard - Washington, DC

From: dmaasjo@caldakintl.com

Sent: Wednesday, March 08, 2006 3:49 PM

To: Chavez, Richard - Washington, DC

Subject: Change in USDA rule on Ocean frt PL 480

rsindt@krooth.com; cvbean@wwt.net

March 8, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, US Department of Agriculture Rm. 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Re: Proposed Rule on Procurement of Commodities for Foreign Donation

Dear Sir:

Cc:

These comments are submitted on behalf of CalDak International LLC to the above referenced proposed rule published by the Commodity Credit Corporation, in the December 16, 2005 edition of the Federal Register (70 FR 747717-74721). CalDak International LLC is an Exporter of dry edible beans and is a member of the North Central Bean Dealers Association, which is a member of the US Dry Bean Council. A significant tonnage of several classes of dry beans are procured and utilized annually by the CCC in its export Food Aid Program. The purpose of these comments is to strongly support the change in the procurement policy of commodities for foreign donation as outlined by CCC in the proposed rule

The CCC proposal would require firm, fixed rate and availability to be submitted to CCC for the purpose of purchase evaluations and bookings in the export of food aid commodities. We agree that adopting the CCC proposal will streamline the procurement process and allow for more efficient acquisition of food aid. These efficiencies will have an overall cost savings for food aid commodities that are desperately needed around the world. As such, budget savings that accrue form the proposal implementation more funds can be made available for the procurement of more foodstuffs's to meet program objectives. Such a result will be beneficial to the many hungry recipients around the world as well as all who participate in the Food Aid Program.

As a member of the NCBDA I am pleased to support the proposed rule and appreciate the opportunity to submit these comments. Thank you

Sincerely

Deon Maasjo CalDak International LLC 1790 32nd Ave, S Fargo ND 58103.



205 Wost Fayette Street
Ballmore, Maryland 21201 3443
410 525 2220 - Assw carnolicre leforg

March 6, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency U.S. Department of Agriculture Rm. 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Dear Sir or Madam:

Subject:

Procurement of Commodities for Foreign Donation, Proposed Rule

CCC 7 CFR Part 1496

Catholic Relief Services (CRS) appreciates the opportunity to comment on the proposed rule to adopt new procedures for use in the evaluation of bids in connection with the procurement of commodities for donation overseas, with a simultaneous review of commodity and ocean freight offers when evaluating lowest landed cost options.

CRS supports this proposal. The one step bid process will streamline the procurement process. It will reduce the procurement cycle by several weeks, which will have a positive effect on commodity issues related to timeliness of delivery, eliminate delays, and lower costs. Most important, by improving the delivery time, we will better be able to serve our beneficiaries and minimize pipeline breaks.

We look forward to the implementation of this proposed rule.

Sincerely,

Bonnie Green

Senior Commodity Advisor



John J. Jaskot Direct Dial 202-203-1000 Direct Fax 202-203-0000 jjaskot@joneswalker.com

March 9, 2006

VIA FACSIMILE AND EMAIL

Mr. Cleveland H. Marsh Director, Commodity Procurement Policy & Analysis Division Farm Service Agency U.S. Department of Agriculture 1400 Independence Ave., SW - Room 5755-S Washington, D.C. 20250-0512

Re:

Proposed Rule / RIN 0560-AH39

Commodity Credit Corporation

Procurement of Commodities for Foreign Donation

Dear Mr. Marsh:

On behalf of our clients, Central Gulf Lines, Inc. (Central Gulf) and Waterman Steamship Corporation (Waterman), we are writing in response to the above-referenced Commodity Credit Corporation (CCC) notice of proposed rulemaking (NPRM) published in the Federal Register on December 16, 2005. In that NPRM, the CCC seeks public comment regarding the proposed new procedures to be used in the evaluation of bids for the procurement of commodities for donation overseas. In particular, the CCC proposes to amend its existing regulations to provide for the simultaneous review of commodity and ocean freight offers when evaluating lowest-landed cost options in connection with the procurement of commodities for shipment overseas. Central Gulf and Waterman are most concerned that the adoption and implementation of the proposed new procedures by the CCC may ignore applicable cargo preference laws and policies established under the authority of Title II of the Agricultural Trade Development and Assistance Act of 1954 ("P. L. 480"), the Food for Progress Program, the McGovern-Dole International Food for Education and Child Nutrition Program, and other cargo preference programs.

U.S.-Flag Ocean Service Priorities

In the NPRM, the CCC is virtually silent about the need to comply with applicable U.S.flag cargo preference laws and policies for the shipment of P.L.480 and other government-

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JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE L.L.P.

sponsored cargoes. Though the CCC described in some detail the new procedures that it proposes to follow in the commodity bid evaluation process, the agency avoids any real discussion in the NPRM about the vital need to ensure that the adoption and implementation of new CCC procedures will comply with applicable cargo preference requirements for the priority use of U.S.-flag commercial vessels. Accordingly, the CCC must ensure, through applicable rules, policies and procedures, that it will strictly adhere to U.S.-flag commercial vessel priorities properly established by the U.S. Maritime Administration (MarAd) for the carriage of government-sponsored cargoes.

On this cargo preference issue, it should be pointed out that the only basis under which a "priority two" carrier (one using a combination of U.S.-flag and foreign-flag vessels for a given transport) should be awarded the shipment of government-sponsored cargo is if there is no "priority one" space available (space that is totally U.S.-flag from loading to delivery) to carry the total quantity of cargo offered in a given invitation for bid. Clearly, a "priority one" U.S.-flag carrier must be given award preference over a "priority three" foreign-flag carrier as well.

Cargo Transport

In any final regulations promulgated by the CCC in this rulemaking, the agency must require that all vessel carriers specify the maximum cargo that they can transport under a specific invitation for bid. Carriers also must be required to offer freight rates for all bid-points from which they can provide service. Furthermore, when a properly offered cargo preference freight rate is used to establish the lowest landed cost for a particular cargo transport, the CCC procedures must require that the government-sponsored cargo be shipped using the carrier that offered that applied freight rate. Without these requirements, the Kansas City Commodity Office (KCCO), affected federal agencies, and so-called "cooperating sponsors" for the government-sponsored shipments will be able to continue to manipulate the commodity bid and freight rate process to the detriment of those carriers that have fully described their freight capacities and committed their freight rates in response to particular invitations for bids.

Program Administration

Upon the award of the commodity bid by the KCCO and booked freight by the "cooperating sponsor" of the shipment, the new CCC procedures should require that all commodity prices and freight rates for each invitation be made publicly available within seven (7) days after the bid award and freight fixture. Such publication of the prices and rates will ensure proper accountability in the administration of the affected cargo shipping programs.

Conclusion

In the adoption of any new CCC procedures for the procurement and shipment of commodities for foreign donation, Central Gulf and Waterman again want to ensure that any and all applicable cargo preference laws and regulations are properly applied and enforced. The cargo preference laws are designed to maximize the participation of U.S.-flag vessels in the commodities programs administered by the CCC, and are critical to the preservation of a vital U.S.-flag fleet and for the employment of thousands of American merchant mariners. Given the critical need for continued adherence to cargo preference requirements, Central Gulf and Waterman request that the CCC closely work with MarAd and the U.S.-flag maritime industry to ensure that cargo preference requirements for the commodity programs are effectively and properly administered.

Central Gulf and Waterman appreciate your consideration of these comments.

Sincerely,

John J. Jaskot, Counsel Central Gulf Lines, Inc.

Waterman Steamship Corporation



Chicago SouthShore & South Bend Railroad

General Offices 505 North Carroll Avenue Michigan City, Indiana 46360



Fax (219) 879-3754

March 2, 2006

Director, Commodity Procurement Policy & Analysis Division
Farm Service Agency
United States Department of Agriculture
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Via Email to Richard.Chavez@usda.gov

Subject: P.L. 480 Humanitarian Food Aid Program

Dear Sir:

I am Director-Marketing & Customer Service for the Chicago SouthShore & South Bend Railroad. We serve the Illinois International Port District-Lake Calumet, Chicago, IL. Our largest customer at the Port is Transfer Logistics for whom we provide local rail switching service for the various food-aid products that move through the Port under the P.L. 480 food aid program.

Our railroad handles boxcars of various food-aid products from connecting carriers at Chicago and places them at the Port so that Transfer Logistics may transfer the contents to ocean-going containers for eventual shipment overseas. Since this program began at Great Lakes Ports and specifically (in our case) at Chicago in 1998, the business has grown rapidly to the point that this traffic now represents the single largest rail customer at the Port of Chicago-Lake Calumet. We typically handle approximately 3,000 carloads per year for Transfer Logistics with five or six-days/week service, representing approximately 200,000 metric tons. This business has become such an integral part of our service at the Port, that without it, our frequency of switching service would undoubtedly have to be reduced to our other Port customers.

The Chicago SouthShore & South Bend Railroad is proud to be a part of this vitally important program, but we find ourselves concerned that the proposed rule changes regarding a one-step bid process versus the current two-step process may affect the purchase and shipment of these various commodities. We certainly appreciate and understand the need for a bid system that minimizes costs while yielding the most value for our government's funds, but also believe that such changes should be evaluated in a considered and measured manner. Consequently, we do not believe that such changes are "insignificant" as the Commodity Credit Corporation contends, but rather, that such changes warrant a "significant" impact label, thereby insuring that the proposed changes receive the proper degree of scrutiny from all parties involved. The current bid process

and eventual movement of these commodities involves many parties and is a fairly complicated process. None of us want to see changes implemented haphazardly and then regret the unintended or unforeseen consequences that may result from such changes.

The Chicago SouthShore and South Bend Railroad very much appreciates the opportunity to handle these important commodities that are so vital to so many around our world. We are equally grateful for the opportunity to be part of the process to consider changes to the procurement and transportation of these commodities. Should you require any additional information, you may contact me at 219-874-9000, ext. 210, or at ccompton@southshorefreight.com.

Sincerely,

Charles T. Compton

Director-Marketing & Customer Service

CVB



Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, US Department of Agriculture Rm. 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Re: Proposed Rule on Procurement of Commodities for Foreign Donation

Good Day,

These comments are submitted in response to the above referenced proposed rule published by the Commodity Credit Corporation (CCC(in the December 16, 2005 edition of the Federal Register (70 FR 74717-74721). Chippewa Valley Bean Co., Inc. supplies dry beans to CCC in its export food aid programs and strongly supports the proposal that would require firm, fixed freight availability and rates to be submitted to CCC for use in export food aid commodity purchase evaluations and subsequent freight bookings.

Chippewa Valley Bean agrees that the adoption of this proposal would streamline CCC's procurement process making the actual purchase more cost efficient. These increased efficiencies will result in overall cost saving to the food aid programs. Budget savings that accrue from the implementation of this proposal could be used to purchase more food. This would be beneficial not only for hungry food aid recipients overseas but for homeland security concerns in the U.S. People that have food in their bellies are less likely to become terrorists.

Sincerely,

Chippewa Valley Bean Co., Inc.

Cenily Brain

Cindy Brown



January 3, 2006

730 NORTH ALBANY, CHICAGO, IL 60612 USA (773) 265-6500 FAX (773) 265-6985 http://www.columbusfoods.com

Mr. Richard Chavez

United States Department of Agriculture

Fax: (202) 690-2221

Rc:

Procurement of Commodities for Foreign Donation

7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

Columbus Foods is a supplier of vegetable oil. We participate extensively in supplying vegetable oil to the Commodity Credit Corporation ("CCC") in support of the U.S. Government's humanitarian food aid programs. On behalf of Columbus Foods I am writing to request a 45-day extension of the January 17, 2006 date established by CCC's notice (70 Fed. Reg. 74717) of a proposed rule to adopt new procedures to be used by CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. That notice was published in the Federal Register of December 16, 2005, immediately prior to the holidays. I have only just become aware of the notice. Although I am sure that the timing of the publication was not intended to cut short the comment period, it certainly has had that effect for me and for other interested organizations in my industry with whom I have been in communication.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many years." And while the notice states that the proposed rule has been determined to be "not significant," the background discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures, including changes in port allocations and carrier selection. The notice also includes an unexplained reference to the "use of different types of ocean services."

Columbus Foods believes that the revised procedures contemplated by the proposed rule have wide-ranging implications that require careful evaluation and informed comment, not a hasty response such as that which would be required by the date currently established in the Federal Register notice. We accordingly request that the date be extended for 45 days.

Sincerely,

John K. Healy General Manager

Columbus Foods Company

Chavez, Richard - Washington, DC

From: ravener@connellco.com

Sent: Monday, January 09, 2006 4:47 PM

To: Chavez, Richard - Washington, DC

Cc: ravener@connellco.com

Subject: Procurement of Commodities for Foreign Donation; 7 CFR Part 1496, RIN 0560-AH39

Re: Procurement of Commodities for Foreign Donation

7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

The Connell Company is a supplier of Rice; Milled, Brown and/or Paddy. We participate extensively in supplying those commodities to the Commodity Credit Corporation ("CCC") in support of the U.S. Government's humanitarian food aid programs. On behalf of The Connell Company, I am writing to request a 45-day extension of the January 17, 2006 date established by CCC's notice (70 Fed. Reg. 74717) of a proposed rule to adopt new procedures to be used by CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. That notice was published in the Federal Register of December 16, 2005, immediately prior to the holidays. I have only just become aware of the notice.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many ears." And while the notice states that the proposed rule has been determined to be "not significant," the packground discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures, including changes in port allocations and carrier selection. The notice also includes an unexplained reference to the "use of different types of ocean services."

The Connell Company believes that the revised procedures contemplated by the proposed rule have wide-ranging implications that require careful evaluation and informed comment, not a hasty response such as that which would be required by the date currently established in the *Federal Register* notice.

We accordingly request that that date be extended for 45 days

Respectfully,

THE CONNELL COMPANY,

J.F. Ravener
Senior Vice President
The Connell Company
One Connell Drive
Berkeley Heights, New Jersey 07922 U.S.A.

Tel: (908) 673-3700 Fax: (908) 673-3800

E-mail: ravener@connellco.com

JFR:iro

Chavez, Richard - Washington, DC

From:

ravener@connellco.com

Sent:

Friday, March 17, 2006 10:38 AM

To:

Chavez, Richard - Washington, DC

Cc:

ravener@connellco.com

Subject:

Procurement of Commodities for Foreign Donation; 7CFR Part 1496, RIN 0560-AH39

Importance: High

Re[.]

Procurement of Commodities for Foreign Donation

7CFR Part 1496, RIN 0560-AH39

Gentlemen:

This is to advise that we, The Connell Company, have received a brief of the testimony provided at the February 21, 2006 meeting and we feel that we have not gained any further insight to the CCC's planned action. Therefore we must again repeat our concerns as listed in our e-mail of January 9, 2006 below:

---- Original Message ---From: Joseph Ravener
To: Richard Chavez
Cc: Joseph Ravener

Sent: Monday, January 09, 2006 4:46 PM

Subject: Procurement of Commodities for Foreign Donation; 7 CFR Part 1496, RIN 0560-AH39

Re: Procurement of Commodities for Foreign Donation

7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

The Connell Company is a supplier of Rice; Milled, Brown and/or Paddy. We participate extensively in supplying those commodities to the Commodity Credit Corporation ("CCC") in support of the U.S. Government's humanitarian food aid programs. On behalf of The Connell Company, I am writing to request a 45-day extension of the January 17, 2006 date established by CCC's notice (70 Fed. Reg. 74717) of a proposed rule to adopt new procedures to be used by CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. That notice was published in the Federal Register of December 16, 2005, immediately prior to the holidays. I have only just become aware of the notice.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many years." And while the notice states that the proposed rule has been determined to be "not significant," the background discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures, including changes in port allocations and carrier selection. The notice also includes an unexplained reference to the "use of different types of ocean services."

The Connell Company believes that the revised procedures contemplated by the proposed rule have wideranging implications that require careful evaluation and informed comment, not a hasty response such as that which would be required by the date currently established in the *Federal Register* notice.

We accordingly request that that date be extended for 45 days

Respectfully,

THE CONNELL COMPANY,

J.F. Ravener Senior Vice President The Connell Company
One Connell Drive
Berkeley Heights, New Jersey 07922 U.S.A.
Tel: (908) 673-3700
Fax: (908) 673-3800
E-mail: ravener@connellco.com

JFR:iro



January 12, 2006

Director Mr. Richard Chavez
Commodity Procurement Policy & Analysis Division
United States Department of Agriculture
Farm Service Agency
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Fax: (202) 690-2221

Re: Procurement of Commodities for Food Aid Programs

7 CFR Part 1496, RIN 0560-AH39

Dear Mr. Chavez:

Didion Milling, Inc. is a supplier of Vegetable Oil, Corn Soy Blend, and Corn Meal to the USDA for Export Food Aid Programs. We participate extensively in supplying these commodities to the Commodity Credit Corporation ("CCC") in support of the U.S. Government's humanitarian food aid programs. On behalf of Didion Milling, Inc., I am writing to request a 45-day extension of the January 17, 2006 date established by the CCC's notice 70 Fed. Reg. 74717. This notice is in regard to a proposed rule to adopt new procedures to be used by the CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. The notice was published in the Federal Register on December 16, 2005, immediately prior to the holidays.

Didion Milling, Inc. is interested in reducing the cost of inland and ocean transportation to the program so that more funds are available to purchase additional value added U.S. food products to feed needy people abroad. Didion Milling, Inc. has only recently become aware of the notice and we feel this proposed rule may have a serious effect on our business and the program as a whole. Although I am sure the timing of the publication was not intended to cut short the comment period, it appears that it will have a direct effect on our companies operations and other interested organizations in the industry which we have had communication with. We want additional time to better understand what effect it will have and therefore request the 45 day extension.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many years." And while the notice states that the proposed rule has been determined to be "not significant," the background discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures. Our concerns are the proposed changes that may effect the port allocations and selection of the carrier. Didion Milling, Inc. has concerns the procedures may permit the return of negative business practices such as "blocking rates" whereby a steamship line offers a rate for a port, inter-modal point, or coastal range where it has traditionally not provided service. Blocking rates serve no purpose and inhibit the government's objective to achieve the lowest landed cost and limit carrier participation or shippers lowest inland transportation cost. A provision should be adopted whereby only competitive rates, not cost constructed ones, are to be evaluated. Our company has experienced the net effect of blocking rates in the past at the detriment of the program and our ability to offer the lowest transportation cost to the blocked port.

Didion Milling, Inc. is also concerned that above all other considerations of this rule change, the Section 17 Great Lakes Set-aside must remain a viable program. The MSA issue will require a significant amount of input and study to assure Section 17 is unaffected and protected by this rule change. Section 17 has reduced transportation cost and has improved service levels for the export food aid program and it must remain intact. Finally, the notice also includes an unexplained reference to the "use of different types of ocean services." It is unclear as to what this refers to and what effect this language has on our company and the program as a whole.

Didion Milling, Inc. believes the revised procedures contemplated by the proposed rule have wide-ranging implications that require careful evaluation and informed comment, not hasty response. Accordingly, it is our request the date established in the *Federal Register* notice be extended an additional 45 days. Thank you very much for your careful consideration of our concerns.

Sincerely yours,

John A. Didion

CEO

Didion Milling, Inc.

INTERNATIONAL



5775 PEACHTREE-DUNWOODY RD. • BLDG. G, STE. 500 • ATLANTA, GEORGIA 30342 (404) 252-3663 • FAX (404) 252-0774 • E-mail: ifac@kellencompany.com

VIA email: Richard.Chavez@usda.gov

March 7, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, US Department of Agriculture Rm. 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Re: CCC Proposed Rule on Procurement of Commodities for Foreign Donation

Dear Sir or Madame:

On behalf of the PL 480 Subcommittee of the International Food Additives Council (IFAC), these comments are submitted in response to the above referenced proposed rule published by the Commodity Credit Corporation (CCC) in the December 16, 2005 Federal Register (70 FR 74717-21). IFAC's PL 480 Subcommittee is composed of companies who manufacture and supply minerals that are utilized to nutritionally fortify several commodities procured by CCC for foreign donation. IFAC supports the change in procurement policy of commodities for foreign donation as outlined by CCC in the proposed rule.

The proposed rule would require firm, fixed freight rates and availability to be submitted to CCC that would be used in export food aid commodity purchases, and in subsequent freight bookings. CCC indicates that the proposal will streamline its food aid procurement process and allow for more efficient acquisition of food aid commodities. We agree with CCC's analysis and believe that the resultant efficiencies will achieve overall cost savings in the purchase and overseas delivery of commodities to these valuable food aid programs. And, the budget savings realized from implementing the proposal can then be used to procure and deliver more foods to meet the humanitarian purpose of these programs. The proposed rule will benefit not only overseas commodity recipients, but also US farmers, packagers, processors, and other entities that participate in the export food aid programs.

Again, IFAC supports the rule as proposed. We appreciate the opportunity to be able to submit these comments.

Sincerely,

Lyn O'Brien Nabors

Lyn O'Brien Nabors President



3600 E. 95th Street 95th and the Lakefront Chicago, IL 60617-5193 773-646-4400 773-221-7678 (FAX)

January 10, 2006

BY OVERNIGHT DELIVERY

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of Agriculture
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

BY FAX AND E-MAIL

Mr. Richard Chavez
United States Department of Agriculture
Fax: (202) 690-2221

E-mail: Richard.Chavez@USDA.gov

Re:

Procurement of Commodities for Foreign Donation 7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

The Illinois International Port District in Chicago, IL is a significant participant in U.S. Government humanitarian food aid programs. Large volumes of commodities purchased by the Commodity Credit Corporation ("CCC") are handled at our facilities in support of the food aid programs. On behalf of The Illinois International Port District, I am writing to request a 45-day extension of the January 17, 2006 date established by CCC's notice (70 Fed. Reg. 74717) of a proposed rule to adopt new procedures to be used by CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. That notice was published in the Federal Register of December 16, 2005, immediately prior to the holidays. I have only just become aware of the notice. Although I am sure that the timing of the publication was not intended to cut short the comment period, it certainly has had that effect for me and for other interested organizations in my industry with whom I have been in communication.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many years." And while the notice states that the proposed rule has been determined to be "not significant," the background discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures, including changes in port allocations and carrier selection. The notice also includes an unexplained reference to the "use of different types of ocean services."



Port of Chicago Foreign Trade Zone No. 22

Procurement of Commodities for Foreign Donation 7 CFR Part 1496, RIN 0560-AH39

January 10, 2006 Page 2

The Illinois International Port District believes that the revised procedures contemplated by the proposed rule have wide-ranging implications that require careful evaluation and informed comment, not a hasty response such as that which would be required by the date currently established in the *Federal Register* notice. We accordingly request that that date be extended for 45 days.

Respectfully,

Anthony G. Ianello, Jr. Executive Director

AGI:slk

March 3, 2006

Mr. Richard Chavez
Director, Commodity Procurement Policy & Analysis Division, Farm Service Agency
United States Department of Agriculture (USDA)
Rm. 5755-S, 1400 Independence Avenue, S. W.
Washington, DC 20250-0512

Dear Mr. Chavez:

The Illinois International Port District wishes to inform you that it wholeheartedly supports the comments presented by Mr. Kevin Tunney of Transfer Logistics at the February 21, 2006 meeting held by USDA in Washington regarding the proposed rulemaking changes to commodities procurement.

The movement of this cargo is of vital importance to the Port of Chicago, the State of Illinois, and those people who are providing this economic and worthwhile advantage to the system. If I can be of any further assistance, please do not hesitate to contact me; and if you would, please keep me abreast of the rulemaking changes. Thank you.

Sincerely,

Anthony G. Ianello, Jr. Executive Director Illinois International Port District

AGI:slk

Shavez, Richard - Washington, DC

Sent: To: Subject: jeanpublic@yahoo.com
Friday, December 16, 2005 10:09 AM
rodney.frelinghuysen@mail.house.gov; Chavez, Richard - Washington, DC
public comment on federal register of 12/16/05 vol 70 no 241 pg 74717

fr doc e5-7460
usda ccc 7 cfr part 1496
rin 0560-ah39 procurement of commodities for foreign
donation

i think only american ships should be delivering american goods. i suggest that a way be worked out to get quick delivery from american shippers. if the costs are higher for american ships, so be it. i hope that such american ships also have a higher standard of protection, a higher standard of labor, a higher standard of no pollution of the seas, etc.

it is clear that we do not want the u.s. to go downward in any of the above. use of foreign ships allows exactly that. they achieve lower costs by less protection, less standards of labor, more pollution of the sea, etc. we do not want america to have lower standards. we also want jobs for americans, not jobs for everybody else, as this present administration seems to encourage.

achau lm st ⊷rham park nj 07932

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35 WEST WACKER DRIVE CHICAGO, ILLINOIS 60601-9703

48 RUE DU RHONE 1204 GENEVA, SWITZERLAND

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CONSTANTINE G. PAPAVIZAS (202) 282-5732 competizas Gwinston.com 1700 K STREET, N.W. WASHINGTON, D.C. 20006-3817

(202) 282-5000

FACSIMILE (202) 282-5100

www.winston.com

January 6, 2006

333 SOUTH GRAND AVENUE LOS ANGELES, CALIFORNIA 90071-1548

200 PARK AVENUE NEW YORK, NEW YORK 10166-4193

> 21 AVENUE VICTOR HUGO 75116 PARIS, FRANCE

101 CALIFORNIA STREET SAN FRANCISCO, CALIFORNIA 94111-5694

By Facsimile Transmission and By E-Mail

Commodity Procurement Policy & Analysis Division Farm Service Agency U.S. Department of Agriculture 1400 Independence Avenue, SW, Rm. 5755-S Washington, D.C. 20250-0512

Attn: Richard Chavez

Re: Notice of Proposed Rule re Procurement of Commodities for Foreign

Donation, RIN 0560-AH39, 70 Fed. Reg. 74,717 (Dec. 16, 2005)

Dear Mr. Chavez:

n p4

On behalf of our client, Liberty Maritime Corporation, we hereby request that the close of the public comment period for the above-referenced notice (the "NPRM") be extended for 30 days until February 16, 2006.

Liberty Maritime Corporation is the operator of U.S.-flag and foreign-flag vessels principally engaged in the transportation of agricultural commodities procured in accordance with rules that would be amended by the NPRM. The NPRM proposes to modify significantly a rule governing the methodology for the procurement of commodities and, in effect, ocean transportation services. Thus, the rule will have a significant impact on Liberty Maritime Corporation and other ocean carriers as well as a host of others involved in USDA's procurement of commodities.

The NPRM proposes to modify significantly a rule that has been in effect in large part since 1979. In and of itself, the modification of a rule that has been in effect for over 25 years should be undertaken deliberately and with careful consideration of the consequences and effects. On this basis alone, we believe that an extension of the public comment period is justified.

Commodity Procurement Policy & Analysis Division January 6, 2006 Page 2

In addition, the affected regulation is only a piece in a much broader and complicated mosaic of statutes and regulations. Most of the underlying food-aid programs have been in existence for more than 50 years. There are also overlapping laws and regulations more directly affecting ocean transportation providers. Some of those considerations emanate from laws not administered by USDA. We urge USDA to pause to be sure that as many complications as possible are considered.

For this and other reasons, the rule being amended has in the past had its share of controversies. The concept of "lowest landed cost" in the current rule, for example, was the subject of litigation. See City of Milwaukee v. Yeutter, 877 F.2d 540 (7th Circuit 1989), cert. denied 493 U.S. 976 (1989). We respectfully urge USDA to extend the comment period to help ensure adequate and informed public comment that will ultimately benefit the rule-making process.

At the same time, the NPRM expresses no urgency. There is no Congressionally mandated deadline to prompt the NPRM. Additional time should be provided to the affected public to comment given the magnitude of the rule and the lack of time pressure.

Thank you for your consideration of this request.

Very truly yours,

Constantine G. Papavizas

Counsel to Liberty Maritime Corporation

35 WEST WACKER DRIVE CHICAGO, ILLINOIS 60601-9703

43 RUE DU RHONE 1204 GENEVA, SWITZERLAND

BUCKLERSBURY HOUSE 3 QUEEN VICTORIA STREET LONDON, EC4N 8NH 1700 K STREET, N.W. WASHINGTON, D.C. 20006-3817

(202) 282-5000

FACSIMILE (202) 282-5100

www.winston.com

March 9, 2006

333 SOUTH GRAND AVENUE LOS ANGELES, CALIFORNIA 90071-1543

200 PARK AVENUE NEW YORK, NEW YORK 10166-4193

> 21 AVENUE VICTOR HUGO 75116 PARIS, FRANCE

101 CALIFORNIA STREET SAN FRANCISCO, CALIFORNIA 94111-5894

CONSTANTINE G. PAPAVIZAS
(202) 282-5732
cpapavizas@winston.com

By Facsimile Transmission and By E-Mail

Commodity Procurement Policy & Analysis Division Farm Service Agency U.S. Department of Agriculture 1400 Independence Avenue, SW, Rm. 5755-S Washington, D.C. 20250-0512

Attn: Richard Chavez

Re: Notice of Proposed Rule re Procurement of Commodities for Foreign

Donation, RIN 0560-AH39, 70 Fed. Reg. 74,717 (Dec. 16, 2005)

Dear Mr. Chavez:

Thank you for the opportunity to comment on the above-referenced Notice (the "NPRM"). The following comments are submitted on behalf of our client Liberty Maritime Corporation ("Liberty").

Liberty is the operator of U.S.-flag vessels principally engaged in the transportation of agricultural commodities procured in accordance with the rule that would be amended by the NPRM. The NPRM proposes to modify significantly that rule which governs the methodology for the procurement of commodities and, in effect, ocean transportation services. Thus, the rule will have a significant impact on Liberty.

Liberty commends the Commodity Credit Corporation ("CCC") for taking the initiative to streamline the process of procuring commodities and ocean transportation services. Much of what is procured by the Kansas City Commodity Office ("KCCO") for shipment overseas under the current rule is intended for emergency famine relief. Liberty supports taking any reasonable, lawful action that would expedite the shipment of commodities for famine and other relief.

Liberty also commends CCC for recognizing that the two-step process for the procurement of commodities positioned to result in the lowest landed cost is cumbersome and results in unnecessary administrative burdens at CCC. The NPRM also recognizes that the two-

Commodity Procurement Policy & Analysis Division March 9, 2006 Page 2

step process does not always result in the commodities being purchased and shipped at the lowest landed cost.

Overall Purpose of the Proposed Rule. Liberty agrees with the observation in the NPRM that the two-step process can result in commodities being purchased for delivery to a location that does not ultimately result in the lowest landed cost. This arises, in part, from the ability of transportation providers to offer indications of interest for which they are not held accountable. A single-step process should help alleviate this problem, and therefore Liberty supports the move to a single-step process.

Availability of Shipment from Ocean Ports. The preamble to the proposed rule indicates that "[o]ffers of commodities and freight would be invited on a 'bid-point' basis." Liberty supports this concept so long as bid-points include points within ocean ports, as is the case today. If commodities are only made available for shipment from inland ports, this will reduce competition for ocean transportation services and thereby increase the cost to the program for such services. To preserve the widest range of options and to stimulate the greatest competition, CCC should continue to require commodity suppliers to include bid-points within ocean ports.

Application of Cargo Preference Requirements. The NPRM preamble notes that there are cargo preference requirements, which are administered by the U.S. Maritime Administration, that also apply to the procurement of ocean transportation services. Those requirements are not referenced in the text of the proposed rule.

The Cargo Preference Act of 1954, as amended, is of vital importance to Liberty, the U.S.-flag industry and, as indicated many times by the President and the U.S. Congress, to our country. Substantially all of the U.S.-flag vessels engaged in the international commercial trade have carried U.S. Government food aid.

As Congress indicated in 1954, the purpose of the Cargo Preference Act "is to implement the policy established in the Merchant Marine Act, 1936, that the United States should have a merchant marine sufficient to carry a substantial portion of its waterborne export and import foreign commerce." H. Rep. 2329, 83rd Cong., 2d Sess. (1954). That purpose has the same vigor today as it did 50 years ago.

The Cargo Preference Act of 1954, as amended, speaks, of course, to every U.S. Government agency which arranges for U.S. Government-impelled movements of cargo. Every department and agency engaged in such arrangements is responsible for complying with cargo preference requirements under the overall supervision of the U.S. Department of Transportation. See 46 U.S.C. app. § 1241(b)(2). DOT has delegated this responsibility to the U.S. Maritime Administration. 49 C.F.R. § 1.66(e).

There is no doubt that MarAd has primacy with respect to the administration of the Cargo Preference Act of 1954. This was confirmed by the U.S. Department of Justice in an April 19, 1994 memorandum issued to DOT on the issue of "MARAD Rulemaking Authority Under

Commodity Procurement Policy & Analysis Division March 9, 2006 Page 3

Cargo Preference Laws." The Justice Department indicated, among other things, that the law gives MarAd "substantial authority and leeway in imposing a degree of uniformity upon other departments and agencies in the administration of their cargo preference programs."

Liberty urges CCC to remain mindful of its cargo preference obligations and MarAd's statutorily mandated role, and urges CCC to reflect the necessity to comply with cargo preference requirements in the final rule or the preamble to that rule. The NPRM indicates that the "cargo preference requirements would be determined initially and not subject to change of carriers." It is unclear as to how those requirements would be applied, and the proposed rule does not provide any guidance or parameters. Liberty recommends that CCC explain how cargo preference requirements will be applied and complied with before CCC proceed to a final rule.

Necessity for Public Comment. CCC concludes in the NPRM that "CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule." 70 Fed. Reg. 74,717, 74,719. Liberty does not agree with this conclusion, although finds it difficult to dispute without knowing CCC's reasoning. The NPRM does not contain a reason for this conclusion. As we expect CCC understands, there is substantial case law for the proposition that an agency's characterization of whether an activity is subject to notice and comment requirements is not dispositive. Liberty therefore requests that CCC produce its reasoning for concluding that notice and comment protections do not apply to the subject matter of the NPRM.

FBES. The NPRM also indicates that the proposed rule is part of a process by KCCO to update is computerized bid evaluation systems. One of those systems is the Freight Bid Entry System ("FBES").

FBES has the potential to be a very important development in the procurement of commodities and ocean transportation and other services for the foreign assistance programs to which it will be applied. It will integrate and potentially make seamless a complicated process of assessment, evaluation and procurement. The economic, legal and policy considerations that will be automated are numerous. They derive from a number of statutes, regulations, directives, interpretations etc. Many of these legal requirements are not immediately within CCC's purview or authority.

Despite its importance, FBES has, to date, been developed without significant industry input. A general description of FBES was provided at a food-aid conference in May 2005, but that description does not substitute for a formal proposal subject to comment. Even that general description was preliminary and the system being described was subject to change.

Similarly, a public meeting was held on February 21 at USDA headquarters. This was a useful meeting, and Liberty appreciates CCC's effort to maintain open lines of communication regarding the proposed rule. However, it was made clear at the meeting that the subject of FBES and regulatory activity that follows-on to the proposed rule was a subject outside the scope of the

Commodity Procurement Policy & Analysis Division March 9, 2006
Page 4

public meeting. As a result, that meeting was not a substitute for meaningful public communication regarding FBES implementation.

Liberty urges USDA to have a dialogue with affected private persons with regard to the implementation of FBES. FBES is too important and significant a system to be developed, tested, adopted and implemented without the input of affected persons. Liberty believes that the law requires such input in the form of rulemaking adopted with the benefit of notice and comment. The adoption of the myriad rules and processes necessary to implement FBES, including cargo preference laws, are simply not exempt from public notice and comment.

Even aside from the legal framework, it is good business and prudent policy to ensure that CCC obtains the benefit of various viewpoints so as to help ensure that the system is functional, accomplishes what it is intended to do and is supported by the affected industry. Therefore, the development of FBES should be as transparent as possible. This should occur both because it is required and because it is the best course.

Until more information is available regarding FBES, Liberty reserves the right to provide additional comments on the NPRM. The right to provide comment on the NPRM does not, and cannot, substitute for the right to comment on what is equally important, namely the creation of FBES. FBES has the potential to affect significantly the outcome of ocean transportation procurements. It is only fair that Liberty, and other affected persons, have an opportunity to participate in the FBES formulation and testing process to ensure that one segment or another of the industry is not disadvantaged in some unanticipated way.

Liberty is well aware that CCC has devoted considerable time and resources to FBES, and Liberty is supportive of that effort. Liberty also applauds CCC's persistence in pursuing improvements that should benefit the very important underlying foreign assistance programs. Liberty stands ready to assist and urges CCC to give the affected industry the opportunity to do so.

Thank you for your consideration of these comments. Liberty appreciates the opportunity to provide its views.

Very truly yours,

Constantine G. Papavizas

Counsel to Liberty Maritime Corporation

WINSTON & STRAWN LLP

35 WEST WACKER DRIVE CHICAGO, ILLINOIS 60801-9703

43 RUE DU RHONE 1204 GENEVA, SWITZERLAND

BUCKLERSBURY HOUSE 3 QUEEN VICTORIA STREET LONDON, EC4N 8NH 1700 K STREET, N.W. WASHINGTON, D.C. 20006-3817

(202) 282-5000

FACSIMILE (202) 282-5100

www.winston.com

May 8, 2006

333 SOUTH GRAND AVENUE LOS ANGELES, CALIFORNIA 90071-1543

200 PARK AVENUE NEW YORK, NEW YORK 10166-4193

> 21 AVENUE VICTOR HUGO 75116 PARIS, FRANCE

101 CALIFORNIA STREET SAN FRANCISCO, CALIFORNIA 94111-5894

CONSTANTINE G. PAPAVIZAS
(202) 282-5732
cpapavizas@winston.com

By Facsimile Transmission and By E-Mail

Commodity Procurement Policy & Analysis Division Farm Service Agency U.S. Department of Agriculture 1400 Independence Avenue, SW, Rm. 5755-S Washington, D.C. 20250-0512

Attn: Richard Chavez

Re:

Notice of Proposed Rule Supplemental re Procurement of Commodities for Foreign Donation, RIN 0560-AH39, 71 Fed. Reg. 17,767 (April 7,

2006)

Dear Mr. Chavez:

Thank you for the opportunity to comment on the supplemental Notice of Proposed Rulemaking referenced above (the "SNPRM"). The following comments are submitted on behalf of our client Liberty Maritime Corporation ("Liberty").

On March 9, 2006, Liberty submitted comments in the original Notice of Proposed Rulemaking in this docket. At that time, Liberty commented on, among other things, the requirement that the proposed rule comply with cargo preference requirements. Liberty commented to the effect that the Commodity Credit Corporation ("CCC") should be mindful of its cargo preference obligations and the statutorily mandated oversight role of the U.S. Maritime Administration ("MarAd"). Liberty urged CCC to reflect the necessity to comply with cargo preference requirements in the final rule or the preamble to that rule.

The SNPRM goes a long way toward addressing this comment. It indicates that "CCC will, of course, comply with cargo preference requirements" and it includes a provision in the proposed rule that "CCC will award the contract for the purchase of the commodity that results in the lowest-landed cost and would be transported in compliance with cargo preference requirements." The proposed rule also provides that "extenuating circumstances" may preclude

WINSTON & STRAWN LLP

Commodity Procurement Policy & Analysis Division May 8, 2006 Page 2

award based on lowest landed cost, but that "in all such cases, commodities would be transported in compliance with cargo preference requirements."

Despite these positive changes, the NPRM and SNPRM remain unclear as to how the cargo preference requirements will be complied with in the context of the changes contemplated in the proposed rule and in the implementation of the Freight Entry Booking System ("FBES"). The mechanism for compliance with the Cargo Preference Act of 1954 and implementing regulations and policies remains unstated. Liberty continues to recommend that CCC explain how cargo preference requirements will be applied and complied with before CCC proceeds to a final rule.

Thank you for your consideration of these comments. Liberty appreciates the opportunity to provide its views.

Very truly yours,

Constantine G. Papavizas

Counsel to Liberty Maritime Corporation



January 11, 2006

BY FACSIMILE TRANSMISSION AND BY EMAIL

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, Room 5755-S U.S. Department of Agriculture 1400 Independence Avenue, SW Washington, DC 20250-0512

Attn: Mr. Richard Chavez

RE: PROPOSED RULE: <u>PROCUREMENT OF COMMODITIES FOR FOREIGN</u>
<u>DONATION</u>; 7 CFR PART 1496; RIN 0560-AH39

Maybank Shipping Company appreciates the opportunity to provide comments on the proposed rule cited above, as announced in the Federal Register on December 16, 2005.

- 1. This proposed rule change is not in compliance with Executive Order 12866 Regulatory Planning and Review. It is a significant regulatory action for the following reasons, keyed to the conditions promulgated in Section 3(f) of EO 12866:
 - a. Subpara (1): The proposed rule would likely have an annual effect of \$100 million. A sampling of CY 2005 round one bid offers and round two bid offers reveals rate ranges of 6.2% 36.2% (all bids) and 26.8% 60.1% (P1; priority bids). Given the USAID food aid annual budget of \$1.2 billion, of which transportation expense is a substantial part, these percentage differentials indicate a major potential annual effect. The decision to dismiss this constraint must be based on a financial review of factors such as these; none was provided in the Federal Register announcement or during informal fact-finding phone calls to USDA/CCC.
 - b. Subpara (1): This rule has the potential to adversely effect in a material way (as discussed below) U.S. flag carriers and therefore may adversely impact the U.S. maritime industry.

- c. Subpara (2): Non-Interference with cargo preference mandates, although compliance is acknowledged in the rule announcement, cannot be verified since the application program has not been completed, nor has a cargo preference flow chart been provided upon which the software is to be implemented, nor has an assurance of complete and comprehensive validation testing (open to all interested parties) been provided. This is an important transparency of government issue.
- d. Subpara (4): Related to the above comment, policy issues arising out of legal mandates cannot be dismissed until they are identified and reviewed; this has not been accomplished. The principle upon which this rule is based (lowest landed cost) has not been overlaid upon the complex operational scenarios driven by adherence to Cargo Preference Laws nor the mandates of Federal Contracting Laws. This action is necessary to determine the absence of policy conflicts.

Recommendation: Since the above conditions cannot be shown to be non-applicable and therefore should be treated as a *significant regulatory action*, submit this proposed rule in accordance with the Unified Regulatory Agenda as specified in Section 4(b) of EO 12866.

- 2. Rationale provided in the Federal Register for second round rate adjustments cites so-called "trumping" by P1 carriers, implying that this practice is at variance with transportation efficiencies. P1 priority over P2 is mandated by cargo preference; other factors that impact second round adjustments include:
 - a. Added RFP requirements (such as fumigation, door delivery, lining protocol, etc)
 - b. Misinterpretation of first round rates by USDA KCCO (e.g., not considering bundling of offers or applicable minimum/maximum cargo amounts when using first round rate indications)
 - c. Change in market landscape and/or competitive conditions since the submission of bids in the first round (e.g., carriers dropping out or adjusting rates due to unforeseen surcharges)

Recommendation: Accommodate all factors in the determination of courses of action, in particular a possible single bid process that may impose excessively early bid submission windows (greater than 30 days).

3. Errorless automation of any process can be a significant challenge. Adding the complexity of a substantial procedural change at the same time makes such an endeavor highly problematic. This is even more disconcerting when there are federal law compliance issues and such a high potential to significantly impact

U.S. commerce if not implemented properly. During the software development and testing process, the following factors should be accommodated:

- a. MARAD-originated cargo preference flow chart must be incorporated.
- b. MARAD is designated as sole authority to validate compliance with federal cargo preference mandates and to authorize related system software updates/changes.
- c. Linear programs, such as the ones intended to support this process, should be able to provide the optimal solution and a sensitivity report. The sensitivity report provides the impact of constraints on the optimal solution. This is invaluable when analyzing options as well as future facts-based policy initiatives.
- d. Comprehensive modular and system testing must be open and transparent to affected agencies and industry representatives.

Recommendation: Accommodate the above factors in the software system development process.

I appreciate your consideration of these comments. Maybank Shipping Company is prepared to provide amplification or assistance in any way, and would like to participate in any maritime industry forum convened to review this process. My points of contact for this action are: David Shimp and Philip Tomlinson at (843) 723-7891.

Sincerely,

Jack Waybank, Sr. President

Copy to:

Senator Lindsey Graham

Senator James DeMint

Congressman James Clyburn

Congressman Henry Brown

Thomas W. Harrelson, Director, Office of Cargo Preference, MARAD

Teresa C. Lasseter, Administrator, Farm Service Agency, USDA

Hubert Farrish, Deputy Administrator, Commodity Operations, FSA, USDA

Frederick W. Shieck, Acting Administrator, USAID

Denise Scherl, Chief, Transportation Division, USAID

Gloria Tosi, President, American Maritime Congress



March 8, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, Room 5755-S U.S. Department of Agriculture 1400 Independence Avenue, SW Washington, DC 20250-0512

Attn: Mr. Richard Chavez

RE: PROPOSED RULE: <u>PROCUREMENT OF COMMODITIES FOR FOREIGN DONATION</u>; 7 CFR PART 1496; RIN 0560-AH39

Maybank Shipping Company appreciates the opportunity to provide additional comments on the proposed rule cited above, as announced in the Federal Register on December 16, 2005 with comment period extended to March 9, 2006 as announced in the Federal Register on January 23, 2006.

In addition to our comments forwarded on January 11, 2006 (attached), we offer the following input for consideration in evaluating the process by which the subject rule is being evaluated and in implementing such an extensive change.

1. We reiterate that this proposed rule change is not in compliance with Executive Order 12866 – Regulatory Planning and Review. It is a significant regulatory action for the following additional reason (Subpara (4) Section 3(f) of EO 12866):

As mentioned in our previous input, policy issues arising out of legal mandates cannot be dismissed until they are identified and reviewed; this has not been accomplished. The mandate proffered as the principle upon which this rule is based is lowest landed cost but Cargo Preference Laws and Federal Contracting Laws must obviously be followed. In USDA's rush to implement its worthy goal of lowest landed cost, precepts of other statutes with equally compelling justification cannot merely be acknowledged and sidestepped. Lowest landed cost combines all costs (food aid purchase, domestic rail, trucking, warehousing, stevedoring, ocean transport and foreign overland delivery) which is at variance with statutory cargo preference priorities that are not predicated on any total cost combination strategy. Other government programs (e.g., military moves, Ex-Im Bank) cannot circumvent cargo preference laws based on a process that allows coupling of supplier costs with domestic and foreign overland transportation.

Recommendation: Since there exists a very real possibility of policy conflict, this rule should be treated as a *significant regulatory action* and submitted in accordance with the Unified Regulatory Agenda as specified in Section 4(b) of EO 12866.

2. The food aid bid process, be it a proposed single bid or the current double bid process, should use commonly accepted and internationally recognized shipping terms and practices in order to eliminate a major source of confusion in this already confusing process. For example, the Kansas City Commodity Corporation has redefined the well-known Incoterm "F.A.S." for something incomprehensible to a vessel operator. Due to this non-standard shipping term, the vessel operator is forced to utilize the terminal operator also as a stevedore, creating a conflict of interest in many respects including cargo liability.

Recommendation: Incorporate Incoterms and other industry-standard terminology in food aid programs.

I appreciate your continued consideration of our comments. Maybank Shipping Company would like to participate in any maritime industry forum convened to review this process. My points of contact for this action are: David Shimp and Philip Tomlinson at (843) 723-7891.

Sincerely,

Jack Maybank, Sr.

President

Copy to:

Office of Cargo Preference, U.S. Maritime Administration Transportation Division, U.S. Agency for International Development

Ms. Gloria Tosi, President, American Maritime Congress



One Industrial Plaza, Bldg. E Valley Stream, N.Y. 11581

Tel.: 516-256-7700 Fax: 516-256-7701

March 9, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, USDA Room 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Subject:

Federal Register December 16, 2005 – Proposed Rule RIN 0560-AH39

Document ID CCC-2006-0002-0001, 7 CFR Part 1496

Muller Shipping Corporation, a forwarding agent actively participating for several decades in the U.S.-sponsored food aid programs on behalf of Cooperating Sponsors, respectively submits the following comments in response to the Federal Register notice dated December 16, 2005 regarding a proposed rule adopting new procedures to be used by the Commodity Credit Corporation in the evaluation of bids in connection with the procurement of commodities for donation overseas.

While we applaud the initiative and efforts of both the Agency for International Development and the Department of Agriculture in seeking improvements in the freight contracting system, we have several concerns and suggestions regarding the design of the proposed system and its impact on the various partners in the food aid logistics chain.

Impact on the Cooperating Sponsors

Over the years, there are have been two major concerns repeatedly raised by cooperating sponsors related to the packaged commodity procurement system: First, the length of the lead time from when commodity requests are submitted to when they are available for shipment, and; Second, the fact that the procurement system is built around a rather broad production schedule rather than the needs of the program for arrival in country at a specified time. Unfortunately, we see no evidence that the FBES system will address either of these concerns.

From what we have seen, the lead time for the cooperating sponsor in submitting commodity requests will be exactly the same, but the change from a two-step process to a one-step process and the modifications on certain other aspects of the procurement schedule will actually reduce the amount of time for the cooperating sponsor to iron out details, particularly in regards to shipping requirements. Under the current two-step process, freight tenders are issued approximately five weeks after the call forward is submitted, during which time the cooperating sponsor may still consider and request specific shipping requirements. Under the proposed one-step system, this window will be cut in half since the freight tender will need to be issued approximately 2-1/2 weeks after submission of the commodity request.



If a new system is to be implemented, it would be an ideal time to consider how the needs of the cooperating sponsor could be improved regarding in-country arrival of commodities when they are needed. Under the system that has been in place for years, and as far as we can tell will continue to be the case under the proposed FBES system, commodity procurement will still be based on a monthly production schedule that makes no distinction regarding the requested in-country arrival requirements, allowing commodity suppliers to produce the commodity in either of two 15-day shipping windows each month (at their option), and sometimes ship earlier than their designated window. At the same time, freight offers are based on lowest cost, plus the statutory requirements of Cargo Preference, MSA-17, etc., without consideration of the widely divergent shipment schedules and transit times that may be offered by various carriers. Between these variables, the potential incountry arrival time can literally span a period of fifty days. Added to this unpredictability is that on requests with multiple commodities that are planned for simultaneous distribution, parcels may be awarded to different carriers and even to different coastal ranges, resulting in one commodity arriving more than a month earlier or later than other commodities.

The implementation of a this new system could be used to advance changes for the benefit of the cooperating sponsors, but such changes do not appear to be part of the current design.

Forwarding Agent Requirements

Our understanding is that the freight forwarder representing a cooperating sponsor will be required to issue a freight tender simultaneously with the KCCO Invitation and will have a narrow window of 72 hours to evaluate every carrier offer for responsiveness and to seek clarifications where necessary. Until this is tested, it's not at all clear whether this is a reasonable or realistic time frame for this process.

It is also not clear how a forwarding agent will be able to access the system, generate reports, download data, or otherwise determine if he has even seen every offer submitted or whether anything could be missing from his review. When the system was announced to the transportation industry about a year ago and questions were raised regarding these issues it appeared that nothing had been designed to meet the forwarder's needs.

The information available to the forwarders should not be restricted to offers made on commodities for our clients only, since offers often have contingencies that are affected by other commodities on the market, but also because seeing only a partial picture may make it impossible for us to see other potential concerns. At the same time, we should have the option of filtering information in individual reports/queries that are specific for each client, county, geographic region, carrier, forwarder, commodity, and perhaps other variables.

We currently capture data offers into our computer system and therefore have a source of historical data which can be used for budgets, forecasting, and other purposes. In order to have this same knowledge source we would request that we have a readily available ability to download this same data from the FBES system.

Our concerns are in extracting data and other necessary information from the system, in ways that are efficient, useful, practical, dependable, and no less beneficial than the data we currently have



available to us. In the presentations of the system we have attended, we have not seen any specific information in this regard. In fact, it has been our impression that very little consideration had been given to this aspect prior to these questions being asked during the presentation.

Cost and Regulatory Impact of FBES

The FBES system has been introduced, at least in part, as a way to achieve freight savings. Of course, this supposition might never be possible to prove or disprove, but at the very least by running FBES on a trial basis over the course of perhaps three or four monthly purchase cycles it should provide evidence that it is not resulting in substantially higher costs.

Perhaps just as important, running the two systems in parallel will have the advantage of testing known concerns as well as highlighting other possible situations that have not been considered in developing the system. We've already cited potential impact on the cooperating sponsors and the need to ascertain that the forwarders will be able to access, review and verify acceptability of freight offers. No doubt carriers will need to determine if they can input the necessary data without undue difficulty, and the overall responsiveness of the system. There could very well be a number of other items, which may or may not have been suggested, that also need to be put to the test.

One example of how converting to the proposed one-step process could reduce competition and/or result in higher freight rates is the fact that opportunities for combining packaged commodity shipments with bulk cargoes will be lost or greatly diminished. Currently there are instances where bulk commodity tenders and loading schedules coincide closely enough with packaged commodity freight tenders and load port dates that vessel owners can offer combinations that bring the freight rates down on both the bulk and packaged commodities. By advancing the contracting process on packaged commodities by approximately three weeks, these opportunities will be greatly diminished, if not virtually eliminated, since packaged commodity contracts will already be in place by the time bulk commodity tenders are issued.

When the FBES system was announced last year, specific individual purchases were used as examples to illustrate how the two-step process can result in commodities moving great distances across the U.S. and back in a seemingly illogical way, and/or resulting in much higher U.S. flag rates being booked in step two. These appeared to be illustrations of the fact that in the current two-step process commodities are sometimes purchased based on a P2 (U.S. Flag vessel Cargo Preference Priority 2) rate offer when P1 (U.S. Flag vessel Cargo Preference Priority 1) service was available for the cargo, but the P1 carrier did not bid a particular port or vendor delivery point in the first round. This idiosyncrasy of the current system has been pointed out many times over the years as the root cause of many of these anomalies, and it appears that is not being addressed in the FBES system. If that's correct, it means is that P1 carriers will be compelled to continue to offer freight rates from every conceivable vendor delivery point. The irony of this is that the system designers have explained that they must limit the number of quantity ranges (with lower rates based on higher volumes) that can be submitted by carriers because of the number of calculations that will be required to evaluate offers from so many vendor delivery points, but at the same time, FBES incorporates a well-considered design feature that might allow this obstacle to be overcome.



The FBES system design allows a carrier to fine-tune their bid on an individual parcel basis, providing the carrier with the flexibility to offer a different total rate on two parcels of the same commodity, even if both come from the same origin point and go to the same destination point. It was designed this way, at least in part, to allow a carrier to bid a different rate when there is a difference in the terms of the freight tenders for the two parcels, or when the parcel size or some other factor may affect the cost. An extra benefit that could be derived from this feature is the ability for the system to distinguish whether a P1 offer has been made on a specific parcel from even a single vendor delivery point, and thus, if the system were designed to ignore all P2 offers on this parcel until it was determined whether this parcel would be awarded to a P1 carrier, and only then would P2 offers for this same parcel be considered, a P1 carrier may not feel compelled to submit a rate offer from every conceivable vendor delivery point and could eliminate a huge number of potential system computations. This would not only address the issue of making a distinction between P1 and P2 service, it could allow for additional quantity ranges to be added, which would almost certainly result in lower overall costs for the program. If this idea has been overlooked in the planning and design to date, perhaps it should be given serious consideration before the system is launched.

System Performance

As a user of the Food Aid Request Systems ("FARES") system we encounter difficulties in using the system that seem to be related to the system design or perhaps limitations of the platform on which it operates. Sometimes the system responds well, but at other times the response time is slow, pages do not open properly, and at times we are thrown out of the system. In light of the critical timing for the carriers to input their offers and for the forwarders to review the offers, the FBES system will need to be highly dependable.

Sincerely, Muller Shipping Corporation Paul Blizzard, President



North American Millers' Association

600 Maryland Avenue, SW - Suite 450 East - Washington, DC 20024 202,484,2200 - Fax 202,488,7416 www.namamillers.org

March 6, 2006

Director
Commodity Procurement Policy & Analysis Division
Farm Service Agency
United States Department of Agriculture (USDA)
1400 Independence Avenue, SW, Rm. 5755-S
Washington, DC 20250-0512

On the matter of: Proposed Rule on Procurement of Commodities for Foreign Donation

Dear Sirs:

The North American Millers' Association is pleased that an extension of the comment period permits us to offer this input on the notice regarding freight bids on export food aid programs. NAMA is the trade association of the wheat, corn, oat and rye milling industry. It is comprised of milling member companies operating mills in the United States and Canada and associate member companies representing the industries providing products and services to the mills. The aggregate production capacity of NAMA milling members is more than 160 million pounds of product daily, which is about 95% of the total U.S. capacity. In addition, many of our members are vendors of value-added grain products to the US overseas food aid programs. They provide a large portion of the processed and fortified food products under those programs.

NAMA supports the move to a one-bid freight system and has looked forward with great anticipation to the technological ability to implement this alternative. From our understanding of the proposal, it will streamline the process of evaluating freight bids and the marrying of freight and commodity offers to achieve lowest landed cost objectives. We anticipate fewer incidents of non-economic placement of cargo for the purposes of freight bid idiosyncrasies. This should simplify bid analysis dramatically.

From our conversations with implementing partners, this streamlining could result in more timely deliveries, which can pay important dividends to the programs and improve effectiveness to the beneficiaries. Any process improvements that can assist in eliminating delays will make the program more effective and lower costs.

NAMA fully supports the single bid freight changes and encourages their expedited implementation.

Sincerely,

Betsy Faga President

Betsy Jaga



United States
Department of
Agriculture

Office of the Secretary

Office of Small and Disadvantaged Business Utilization

1400 Independence Avenue, SW

Washington, DC 20250-9501

March 16, 2006

TO:

Eric Forman

Associate Deputy Administrator Fruit and Vegetable Program Agricultural Marketing Service

Bert Farrish

Deputy Administrator

for Commodity Operations

Farm Service Agency

FROM:

James E. House

Director, Office of Small and Disadvantaged

Business Utilization

SUBJECT:

Comments on Proposed Rule Pertaining to Agricultural Commodities

We appreciate the opportunity to comment on the proposed rule to change USDA's regulations governing the purchase of agricultural commodities. One proposed change would prohibit USDA from applying the Historically Underutilized Business Zone (HUBZone) price evaluation preference when evaluating bids from contractors that obtain the commodity in substantially the final form in which it is to be supplied to the Government. Another change would permit farmer-owned cooperatives to participate in small business, 8(a), HUBZone and Service Disabled Veteran Owned Small Business (SDVOSB) and Javits-Wagner-O'Day (JWOD) set-asides.

We would like to make some overall policy comments prior to conducting a more detailed review. First, a similar proposed rule had been introduced previously in the Department and there have been numerous discussions about most of the same issues. The Office of Small and Disadvantaged Business Utilization (OSDBU), the Office of Procurement and Property Management (OPPM) and the Small Business Administration (SBA) were involved in the previous discussions, and all should be included in the initial stages of the resurrection of the issues. All pertinent parties should be provided copies of the proposal and be allotted sufficient time to review and comment.

Second, these proposed changes impact programs for which the SBA and the Committee For Purchase From People Who Are Blind or Severely Disabled (the Committee) have policy jurisdiction.

While we recognize that the Agricultural Marketing Service (AMS) and the Farm Service Agency (FSA) have responsibility for developing regulations which impact their programs, we must acknowledge that these proposed changes will significantly alter the administration of small business and JWOD programs in the Department.

We see conflicting laws and regulations. Small business set-asides (and the various subsets such as 8(a), HUBZone, etc.) and JWOD purchases are mandated by law and regulation. The purchase of selected items included in the JWOD Program takes priority over small business procurement programs. The provision in P. L. 106-387 regarding farmer-owned cooperatives appears to be in conflict with the statutory requirements in the Small Business and JWOD Acts. Federal Acquisition Regulation, Part 19.5, stipulates the order of precedence for Federal procurements and specifies mandatory sources and set-aside priorities. There are questions of jurisdiction and questions of which Federal entity should promulgate the regulations.

Our third general comment concerns the determination that the proposed rule would not have a significant economic impact on a substantial number of small businesses under the Initial Regulatory Flexibility Analysis. We question this conclusion if small business set-asides are eliminated in the buying activities or if the set-asides are limited because a farmer-owned cooperative may decide to participate in the bid.

The following are a few additional comments concerning the Proposed Rule:

- The Small Disadvantaged Business Program (SDBP) is referenced several times in the Rule. There is currently no SDB set-aside and the provision for an SDB price evaluation adjustment has expired. Therefore, the SDBP would not have an impact on this regulation and should not be included.
- Under the 8(a) set-aside description, the role of the Director of USDA's OSDBU is not correct. Every major buying activity makes its own determination for the use of an appropriate set-aside for each requirement. OSDBU makes recommendations for set-asides and reviews requirements (over the simplified acquisition threshold) that have not been set-aside.
- Under "Special Provisions for USDA Commodity Purchases", the tiered pricing schedule to implement the HUBZone price evaluation preference is not complete. There is a different system for the price evaluation preference for the purchase of agricultural commodities by the Secretary for export operations through international food aid programs.

Defining "substantially final form", was part of initial discussions with the SBA
which issued an Advanced Notice of Proposed Rulemaking (ANPR) covering this
topic. We are very interested in determining the responses derived from the
ANPR and would be willing to take the lead in tracking the progress of that
project.

This Proposed Rule covers several diverse issues which impact the food commodity programs in USDA. We might want to consider addressing some topics separately in order to advance them through the process more quickly.

There are additional smaller changes and corrections to the document which our staff would be happy to discuss. Please keep us informed of the progress of this Rule and let us know if we can assist you further.

cc: Russ Ashworth
Director, Office of Procurement and Property Management

Chavez, Richard - Washington, DC

: CNolfo@osg.com Wednesday. Janu

Wednesday, January 11, 2006 10:31 AM Chavez, Richard - Washington, DC

Lasseter, Teresa - Washington, DC; Farrish, Bert; DSCHERL@USAID.GOV

Subject: 7 CFR Part 1496 - Proposed Rule -Submission

Mr. Richard Chavez, Director Commodity Procurement Policy & Analysis Division Farm Service Agency United States Department of Agriculture Washington, D.C

Re: 7 CFR Part 1496, Procurement of Commodities for Foreign Donation Proposed Rule

Dear Mr. Chavez:

To:

Cc:

OSG Ship Management, Inc. as Disponent Owner on behalf of Ocean Bulk Ships, and Transbulk Carriers, Inc., formally requests a 90 day extension of comment period on this Proposed Rule from the current deadline of ary, 17, 2006 to April 17, 2006.

This extension will be very important for all interested parties to obtain the necessary information to access the impact a proposed rule change would have on the complex dynamics of one area of Cargo Preference the rule change intends to streamline.

The Proposed Rule is not clear that adherence to existing Cargo Preference laws and policy will be completely maintained as the number one priority.

The mention of a reduction from the ''two-step'' process to a ''one step'' process refers to the current mid-month Title II releases. Additionally, the Notice mentions that the ''new procedures'' ...''..would apply to processed ..and bulk commodities..''. However, under Title II, bulk commodities are already contracted in a ''one-step'' process.

The Notice also makes reference to KCCO being currently in the process of updating its computer bid-evaluation systems which presumably refers to the proposed FBES that has been under development for several years and discussed over the last few years at the Annual USDA Conferences in Kansas City. The last meeting with the carriers that covered an extended list of issues was March, 2005, and there has not been any updated status report issued nor resolution of the issues raised at that time.

The requested 90 day extension will also provide the necessary opportunity for a meeting between USDA and the carriers in Washington, D.C. to remine the actual status of computer upgrades and obtain a status update BES. When will it be fully tested, with carrier participation, to ermine if it can digest and accurately analyze the complexities of an offer from all types of vessels and then correctly determine lowest landed cost? This is an absolutely necessary requirement as the Notice allows for the option to require bids to be submitted ..''using an electronic bid

system''.



aps these issues should be added to the 2006 USDA Conference agenda in pring to allow for an expanded and more thorough discussion and

Thank you for the opportunity to comment and request an extension.

Respectfully submitted

Charles F. Nolfo

Assistant Vice President OSG Ship Management, Inc. U.S. Flag Dry Bulk Sale & Purchase

Tel: 212 578-1807

This electronic mail transmission may contain confidential or privileged information. If you believe you have received this message in error, please notify the sender by reply transmission and delete the message without copying or disclosing it.



To:

Mr. Richard Chavez

United States Department of Agriculture

Fax: (202) 690-2221

Date:

January 11, 2006

From: Port of Seattle

Re.:

Procurement of Commodities for Foreign Donation 7 CFR Port 1496,

RIN 0560-AH30

We just became aware of the proposed rule change in late December, as published in the Federal Register/Vol. 70, No. 241 on December 16, 2005. Due to the holiday period, we are just now starting to evaluate the potential impact of the proposed change on our port's competitive position for donation commodities. The Federal Register notice specifically mentions possible changes in port allocation as a potential impact of the proposed rule change. We do not feel that the deadline of January 17, 2006 for the receipt of comments provides us with enough time to thoroughly research and evaluate the impact of the proposed rule change on our port's food aid business. Furthermore, this date does not provide us enough time to adequately prepare thorough and meaningful comments to this proposed rule change for the procurement of donation commodities.

Accordingly, the Port of Seattle is requesting a 45 day extension of the January 17, 2006 date established by the Commodity Credit Corporation for the receipt of comments on this proposed rule change.

Sincerely, Kent Christopher General Manager Port of Seattle Christopher.k@portseattle.org 206-728-3569

Chavez, Richard - Washington, DC

m:

no-reply@erulemaking.net

__/nt: To: Thursday, March 02, 2006 12:54 PM Chavez, Richard - Washington, DC

Subject:

Public Submission

Please Do Not Reply This Email.

Public Comments on Procurement of Commodities for Foreign Donation:=======

Title: Procurement of Commodities for Foreign Donation

FR Document Number: E6-00683

Legacy Document ID:

RIN: 0560-AH39

Publish Date: 01/23/2006 00:00:00

Submitter Info:

First Name: Racey Last Name: Bingham

Mailing Address: 84 LIberty Ave, Apt B

City: Somerville

Country: United States State or Province: MA Postal Code: 02144

Organization Name: Tufts University

Comment Info: =========

neral Comment: To Whom it May Concern,

a former Peace Corps Volunteer and a current student of International Affairs, Humanitarian Aid and US Agriculture, I find this proposed rule incredibly important to our country's ability to provide aid in a timely and financially reasonable fashion under Title II of Public Law 480.

It is encouraging to note that this proposed rule has been reopened for comment, it is an important issue that should be properly analyzed by the public, and its complexity merits a longer comment period.

The US's system of providing food aid to developing countries and areas suffering form civil strife or natural disaster has outgrown the traditional two-step bidding process in place for many years. This sytem was established when carrier tarrif rates were fixed, and could easily be paired with commodity bids to get the lowest-landed cost of transporting the food aid. However, today once the CCC and the KCCO (Kansas CIty Commodity Office) have determined the lowest-landed cost given unfixed carrier tarrif rates, they must then go back and request freight rate bids.

This is an inefficient process that prevents the prompt delivery of food aid to areas in need. It also makes it difficult for the KCCO and USAID (who actualy handles the purchasing of freight rates) to budget how much they will need for the total cost of shipping.

The time-lag is unnecssary, and although it may take some time for the KCCO to develop the technical capacity to deal with all this data simultaneously it is a worthwhile investment in progressively improving our food aid distribution system.

'e next step will be decreasing the percentage of Title II food aid that needs be purchased in the US for donations overseas.

Thank you for your time.

SAMUEL B. NEMIROW

TIMOTHY B. SHEA

LOREN CLAUDEA HU (1951-1992)

NEMIROW HU & SHEA

A PROFESSIONAL CURPORATION
1629K SUFFEL, N.W.
SUITE 500
WASHINGTON, D.C. 20006

TELEPHONE: (202) 835 0300 TELECOPIER:(202) 835 0306

January 9, 2006

Director
Commodity Procurement Policy & Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attention: Mr. Richard Chavez

Re: Notice at 70 Fed. Reg. 74717 (December 17, 2005), 7 CFR Part 1496, Procurement of Commodities for Foreign Donation -- Proposed Rule

Dear Mr. Chavez.

We are writing on behalf of Sealift, Inc. of Oyster Bay, New York in response to the subject notice. Sealift owns and operates 11US flag vessels at least three of which regularly trade in the carriage of cargoes sponsored by USDA / CCC under Title II and other programs governed by the subject rules. Sealift has a vital interest in the administration of these programs, and, in particular, the procedures to be used in a submission and evaluation of bids in connection with the procurement of commodities for donations overseas.

Sealist respectfully requests that the time to submit comments be enlarged from the current deadline of January 17, 2006.

Achievement of a one step bid process has been a long-term goal of CCC. The effort began more than five years ago but was set aside for lack of funds. The effort was revived when funds were made available for this purpose. The centerpiece of the project has been the software to be used for the submission and ranking of offers for commodities and ocean carriage. Because, however, the conceptual and programmatic systems to accomplish this goal remain work-in-progress at this writing, Sealist has some genuine concerns about whether the contemplated system can accommodate the commercial realities of the current bid system without restricting carriers' ability to craft responsive offers or burdening bid preparation and submission. In order to accomplish the savings sought by CCC, the system must offer commercial transparency for carriers to compete in an informed way. As the notice recognizes, the intention to "add clarity to the bid evaluation process," 70 Fed. Reg. 74717, is essential: a "lottery" type system - whether intended or not -- will not provide any incentives for more competitive bidding. In our view, the starting point for clarity should be a specific side-by-side comparison of outcomes under the current system versus the proposed system. We understand that such a comparison is contemplated and we believe that it should provide an invaluable instruction for all as to the strengths or weaknesses of the system.

Accordingly, Sealist requests that the time for submission of comments be enlarged until such time as a side-by-side comparison of the current system versus the proposed system

can be run with the results made available to the industry. Alternatively, at a minimum, the comment period should be enlarged until a meeting among carriers and program administrators in which the mechanics of the system can be demonstrated and discussed. We believe that this approach will permit the industry to make more informed, focused comments and so yield an improved product. Sealist looks forward to working with you and your colleagues to achieve a suitable product.

Respectfully submitted,

Value

Timothy B. Shea

LAW OFFICES

NEMIROW HU & SHEA

SAMUEL B. NEMIROW LOREN CLAUDEA HU (1951-1992) TIMOTHY B. SHEA A PROFESSIONAL CORPORATION 1629K Street., N.W. SUITE 500 WASHINGTON, D.C. 20006

TELEPHONE: (202) 835 0300 TELECOPIER:(202) 835 0306

By Fax # (202) 690-2221

March 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

Attention: Mr. Richard Chavez

Rc:

Notice at 70 Fed. Reg. 74717 (December 17, 2005), 7 CFR Part 1496, Procurement of Commodities for Foreign Donation -- Proposed Rule

Dear Mr. Chavez.

We are writing on behalf of Sealift, Inc. of Oyster Bay, New York in response to the subject notice. Sealift owns and operates eleven US flag vessels at least three of which regularly trade in the carriage of cargoes sponsored by USDA / CCC under Title II and other programs governed by the subject rules. Sealift has a vital interest in the administration of these programs, and, in particular, the procedures to be used in a submission and evaluation of bids in connection with the procurement of commodities for donations overseas.

Introduction

Scalist is grateful for the extension of time granted to commenters to permit an open meeting on the subject of this rulemaking. Scalist believes that the meeting was useful for many purposes, particularly USDA's commitment to work with Marad and the industry in developing the rules and to educate the industry with respect to the implementation of any rule that may emerge. The recognition of USDA officials that the system is a complex work-in-progress requiring careful testing was also constructive.

It remains Sealist's position, nevertheless, that the information available to the industry on this proposal is so limited that we lack the requisite information to formulate comments. The amendments to the rule are a precursor to adoption of a one-bid system. Both administrative and programmatic changes are contemplated by the amendments. We are unsure, however, as to how much the technical changes are influencing the programmatic changes or the other way around. We are equally concerned about unintended changes that may flow from what are considered to be administrative constraints and mandates. Therefore, as we noted in the open meeting, we urge formation of a government and industry working

group to craft a protocol for a side-by-side test of the two systems so that all interested parties — including USDA — can evaluate the import of the changes contemplated.

Legal Setting

The Administrative Procedure Act requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted. 5 U.S.C. § 553(b)-(c). These requirements, which serve important purposes of agency accountability and reasoned decisionmaking, impose a significant duty on the agency. Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment. The agency must make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule. See American Medical Association v. Reno, 57 F 3d. 1129, 1132, 1133 (D.C. Cir. 1995). The notice-and-comment requirement helps to ensure that the rule is subjected to thoroughgoing analysis and critique by interested parties and the agency. Id. at 1134. The notice and comment provision cannot be turned into a "bureaucratic game of hide and seek." MCI Telecommunications Corp. v. FCC, 57 F 3d 1130, 1142 (D.C. Cir 1995).

The Notice is Premature as Long as Issues Raised by the Industry Remain Unaddressed

The industry has raised a number of concerns about the proposal. One set of comments set out in an email distributed to USDA and AID representatives, dated April 7, 2005, by H. Keith Powell, Sealist's broker, provided a careful summary of points relating to the proposal. See attached copy. The points raised in this memorandum are fundamental to administration of the entire system and deserve careful consideration. Basically, Mr. Powell points out the that the system as contemplated, at least at that time, would not permit carriers to deal with the ordinary kinds of contingencies that are the fabric of ocean carriage. For example, under the contemplated system offers would be tied to an individual vessel. Under the current system, of course, carriers offer individual vessels or named substitutes. The limitation to one vessel is a constraint that seems to come from a computer system, but it obviously will influence not only submission of offers but also the administration of the program. Similarly, under the current system, occan carriers can identify and price out options and alternatives quite simply in their offers. So, for instance, premiums for additional load or discharge ports may be added and additional costs for auxiliary services such as fumigation or inland transportation can be readily set out. The FBES system would not accept those options readily and would require submission of multiple offers in order to capture those kinds of options. Although there have been indications that certain points raised in the Powell email were or would be addressed somewhere in the process, we do not know whether or how these have been remedied.

The very complexity of the system and the need for testing suggest that these activities should be accomplished before the industry comment period is closed so that the interested parties can assess the net effect of these changes.

Adequacy of the Notice

The notice raises a number of legal and policy issues.

The proposed rule relies for authority on 46 U.S.C. app. §1241(b) and 1241f, the Cargo Preference Act of 1954. USDA lacks authority to administer the Cargo Preference Act of 1954 so its reliance on the provision is questionable. Indeed, the method of implementing cargo preference requirements in the proposed system remains unaddressed as yet. Under the current system, for example, if errors are introduced in the process, and later caught by the staff, they can be remedied before the fixtures are finalized; under the new system is not clear whether there is ever contemplated that the computer could err and, if so, what the method of addressing such errors might be. The Notice acknowledges that law mandates "many contract priorities." In one of the most basic mandates, cargo preference, the proposal gives no information as to how it will be the administered in the revised system.

At a minimum, Marad, the agency that administers the Cargo Preference Act of 1954, should be a central participant in the adoption in evaluation and adoption of any revised rule not only because of its statutory role but also because of its expertise in the area. We were gratified to learn from the public meeting that Marad will have a prominent role in the crafting of any rule.

The Notice declares at page 74718 that USDA / CCC proposes to "add clarity" to the commodity in evaluation process by eliminating the to the two-step bid process. The Notice does not explain how the amendments would add clarity to the process. The complexities introduced by the proposal, particularly the elimination of the head to head competition, raise some serious question as to whether these changes will achieve the stated goal at the end of the day. In addition, the discussion should evaluate whether the changes will carry new costs, as the Powell email strongly suggests.

The Notice asserts at page 74718 that the new system should reduce ocean freight rates "considerably" because the tonnage would be consolidated by the carriers' bids. Of course, there are strong incentives for consolidation in the current system. Additional incentives for consolidation may yield savings for shippers. Yet, there is nothing in the Notice that explains the basis for the new incentives for consolidation of the carriers' bids provided in this proposal.

The Notice also indicates that the proposed evaluation process will be more efficient, because ocean carriers are expected to offer quantity increments most economical for them. Again, the assertion is not supported by any rationale.

The suggestion in the Notice that delivery times would be reduced because the current freight evaluation process would be streamlined fails to knowledge that the proposal includes another initiative that is contradictory – elimination of one of the two monthly load windows. No rationale is provided for the elimination of one monthly load period. The discussion should candidly address how elimination of one of the two monthly load periods will reduce delivery times.

Conclusion

From Sealift's perspective, the proposed system is premature and untested. It would introduce administrative constraints and burdens on carriers and their brokers that seemed to be disproportionate to the matters sought to be addressed. Beyond that, the rule would not seem to accommodate the flexibility and transparency necessary for carriers to refine their bids to provide vigorous competition. Accordingly, the economic incentives sought may well be frustrated if carriers are so unable to control risks that they may be required to submit less

competitive offers. Sealist urges, therefore, that adoption of any rule be deferred until the system is completed and tested in a structured side-by-side review.

Sincerely,

Timothy B. Shea

----Original Message-----From: H. Keith Powell

Sent: Thursday, April 07, 2005 3:47 PM

To: 'Scherl, Denise(M/OAA/TC)'; 'Kenneth Martin'; 'Mark Claar'; 'David Liem'; Nelson Randall

(nmrandall@kcc.fsa.usda.gov)

Subject: FBES Presenttion March 31, 2005

Dear All.

First I want to thank all of you for taking the time to meet with the Carriers last week. The discussions proved useful in furthering our understanding of the capabilities and inadequacies of FBES as currently designed. So that we are clear on what was discussed on the key issues, I wanted to summarize these points with my comments and some follow-up questions.

The summary points and my comments are as follows:

- 1) Time Line The programming is to be completed in June with internal testing to run from June until December. External testing to be done during the first quarter of 2006 with implementation immediately thereafter.
- 2) As currently designed, the bids entered into FBES will be tied to an individual vessel. This can present difficulties since many Carriers can not pre-select the performing vessel(s) until the quantity, type of cargo, availability dates and discharge ports are known. It was suggested that the bids be tied to a Carrier so that a carrier has the flexibility to use different vessels to lift the offered quantity. As an example a Carrier may wish to use several vessels to lift a given quantity and can only select the vessels after the award has been made. Alternatively, a Carrier may only wish to use one vessel to lift the awarded quantity, but can only make the decision as to which vessel to use after the awarded quantity, discharge ports and commodity availability dates are known.
- 3) The "Constraint Group" feature ties individual bids (vessels) together so that the same vessel can not be contracted twice. In certain circumstances this is important and the constraint (or subject) should be tied to individual vessels. In other cases the constraint may need to be tied to the bid (not the vessel) as in cases where a Carrier is offering multiple vessels. Another example where a Carrier may need to put a constraint on two or more bids is where there is a capacity limit (other than the vessel capacity). Therefore, I would suggest that the program allow for a constraint to be placed on a bid in addition to the vessel.

P.07

- 4) It was asked if FBES could be modified to allow for load and discharge port call/cost premiums, discharge port minimum and maximums, and additional quantity ranges (over and above the current four per bid). We were told that based on the current softwear and hardwear limitations, if additional variables were introduced, the "run time" required for the LP to reach a solution would greatly exceed the time limitation for making the commodity awards. We were also told that USDA would continue to look at ways to minimize the 'run time" so these and / or other variables can be added to FBES; however at the current time they could not. As an observation, based on Potomac's understanding of FBES, we believe that it is a practical impossibility for us to submit offers in FBES that can approximate the offers that we are currently submitting for several of our clients. In other words, some Carriers will not be able to accurately price out in their bids the voyage duration, voyage distance, number of discharge ports and other cost factors due to system limitations. This will force carriers to work basis their "best guess" or most likely their "worst case" scenarios which we believe will significantly increase cost.
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It was stated by USDA/AID that there can be no modification to the freight offers after their submission, thus if the freight offers are submitted in accordance with the freight tender terms, the PVO review will unlikely result in any bid disqualifications nor can any clarifications sought from the Carners result in any bid modifications. That said we do not see the need for the PVO to be given 5 days to review the offers. We would suggest that this time be reduced and the time saved be used to extend the Freight offer due date.

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on how FBES would handle Cargo Preference. There was no consensus among the industry participants on AID's request.

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We also have the following questions:

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- 3) Since it appears that it's USDA/AID's intent to implement FBES according to a fixed time line. Is USDA/AID willing to commit to resolving the major deficiencies to the satisfaction of the industry before implementing FBES?

End

We wish to point out that the above represents our observations and comments based on the recent meetings and our current knowledge of the program. As we continue to study the system, we no doubt will have other questions, suggestions or concerns which we will bring to your attention. FBES represent the most dramatic change to the ocean freight procurement system since the inception of the food assistance programs and we look forward to continuing to work with USDA/AID on this most important project.

We thank you for your review of the above issues and look forward to your response.

Sincerely,

Keith Powell

SAMUEL B. NEMIROW

TIMOTHY B. SHEA

NEMIROW HU & SHEA

APPOPERSIONAL CORPORATION 1629K Street., N.W. SUITE 500 WASHINGTON, D.C. 20006

TELEPHONE: (202) 835 0300 TELECOPIER: (202) 835 0306

By Fax # (202) 690-2221

LOREN CLAUDEA HU (1951-1992)

March 9, 2006

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of
Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512
Attention: Mr. Richard Chavez

Rc: Notice at 70 Fed. Reg. 74717 (December 17, 2005), 7 CFR Part 1496, Procurement of Commodities for Foreign Donation -- Proposed Rule

Dear Mr. Chavez.

We are writing on behalf of Sealift, Inc. of Oyster Bay, New York in response to the subject notice. Sealift owns and operates eleven US flag vessels at least three of which regularly trade in the carriage of cargoes sponsored by USDA / CCC under Title II and other programs governed by the subject rules. Sealift has a vital interest in the administration of these programs, and, in particular, the procedures to be used in a submission and evaluation of bids in connection with the procurement of commodities for donations overseas.

Introduction

Scalift is grateful for the extension of time granted to commenters to permit an open meeting on the subject of this rulemaking. Scalift believes that the meeting was useful for many purposes, particularly USDA's commitment to work with Marad and the industry in developing the rules and to educate the industry with respect to the implementation of any rule that may emerge. The recognition of USDA officials that the system is a complex work-in-progress requiring careful testing was also constructive.

It remains Sealist's position, nevertheless, that the information available to the industry on this proposal is so limited that we lack the requisite information to formulate comments. The amendments to the rule are a precursor to adoption of a one-bid system. Both administrative and programmatic changes are contemplated by the amendments. We are unsure, however, as to how much the technical changes are influencing the programmatic changes or the other way around. We are equally concerned about unintended changes that may flow from what are considered to be administrative constraints and mandates. Therefore, as we noted in the open meeting, we urge formation of a government and industry working

group to craft a protocol for a side-by-side test of the two systems so that all interested parties including USDA -- can evaluate the import of the changes contemplated.

Legal Setting

The Administrative Procedure Act requires an agency to provide notice of a proposed rule, an opportunity for comment, and a statement of the basis and purpose of the final rule adopted. 5 U.S.C. § 553(b)-(c). These requirements, which serve important purposes of agency accountability and reasoned decisionmaking, impose a significant duty on the agency. Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment. The agency must make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule. See American Medical Association v. Reno, 57 F 3d. 1129, 1132, 1133 (D.C. Cir. 1995). The notice-and-comment requirement helps to ensure that the rule is subjected to thoroughgoing analysis and critique by interested parties and the agency. Id. at 1134. The notice and comment provision cannot be turned into a "bureaucratic game of hide and seek." MCI Telecommunications Corp. v. FCC, 57 F 3d 1130, 1142 (D.C. Cir 1995).

The Notice is Premature as Long as Issues Raised by the Industry Remain Unaddressed

The industry has raised a number of concerns about the proposal. One set of comments set out in an email distributed to USDA and AID representatives, dated April 7, 2005, by H. Keith Powell, Sealist's broker, provided a careful summary of points relating to the proposal. See attached copy. The points raised in this memorandum are fundamental to administration of the entire system and deserve careful consideration. Basically, Mr. Powell points out the that the system as contemplated, at least at that time, would not permit carriers to deal with the ordinary kinds of contingencies that are the fabric of ocean carriage. For example, under the contemplated system offers would be tied to an individual vessel. Under the current system, of course, carriers offer individual vessels or named substitutes. The limitation to one vessel is a constraint that seems to come from a computer system, but it obviously will influence not only submission of offers but also the administration of the program. Similarly, under the current system, occan carriers can identify and price out options and alternatives quite simply in their offers. So, for instance, premiums for additional load or discharge ports may be added and additional costs for auxiliary services such as fumigation or inland transportation can be readily set out. The FBES system would not accept those options readily and would require submission of multiple offers in order to capture those kinds of options. Although there have been indications that certain points raised in the Powell email were or would be addressed somewhere in the process, we do not know whether or how these have been remedied.

The very complexity of the system and the need for testing suggest that these activities should be accomplished before the industry comment period is closed so that the interested parties can assess the net effect of these changes.

Adequacy of the Notice

The notice raises a number of legal and policy issues.

The proposed rule relies for authority on 46 U.S.C. app. §1241(b) and 1241f, the Cargo Preference Act of 1954. USDA lacks authority to administer the Cargo Preference Act of 1954 so its reliance on the provision is questionable. Indeed, the method of implementing cargo preference requirements in the proposed system remains unaddressed as yet. Under the current system, for example, if errors are introduced in the process, and later caught by the staff, they can be remedied before the fixtures are finalized; under the new system is not clear whether there is ever contemplated that the computer could err and, if so, what the method of addressing such errors might be. The Notice acknowledges that law mandates "many contract priorities." In one of the most basic mandates, cargo preference, the proposal gives no information as to how it will be the administered in the revised system.

At a minimum, Marad, the agency that administers the Cargo Preference Act of 1954, should be a central participant in the adoption in evaluation and adoption of any revised rule not only because of its statutory role but also because of its expertise in the area. We were gratified to learn from the public meeting that Marad will have a prominent role in the crafting of any rule.

The Notice declares at page 74718 that USDA / CCC proposes to "add clarity" to the commodity in evaluation process by eliminating the to the two-step bid process. The Notice does not explain how the amendments would add clarity to the process. The complexities introduced by the proposal, particularly the elimination of the head to head competition, raise some serious question as to whether these changes will achieve the stated goal at the end of the day. In addition, the discussion should evaluate whether the changes will carry new costs, as the Powell email strongly suggests.

The Notice asserts at page 74718 that the new system should reduce ocean freight rates "considerably" because the tonnage would be consolidated by the carriers' bids. Of course, there are strong incentives for consolidation in the current system. Additional incentives for consolidation may yield savings for shippers. Yet, there is nothing in the Notice that explains the basis for the new incentives for consolidation of the carriers' bids provided in this proposal.

The Notice also indicates that the proposed evaluation process will be more efficient, because ocean carriers are expected to offer quantity increments most economical for them. Again, the assertion is not supported by any rationale.

The suggestion in the Notice that delivery times would be reduced because the current freight evaluation process would be streamlined fails to knowledge that the proposal includes another initiative that is contradictory—elimination of one of the two monthly load windows. No rationale is provided for the elimination of one monthly load period. The discussion should candidly address how elimination of one of the two monthly load periods will reduce delivery times.

Conclusion

From Sealist's perspective, the proposed system is premature and untested. It would introduce administrative constraints and burdens on carriers and their brokers that seemed to be disproportionate to the matters sought to be addressed. Beyond that, the rule would not seem to accommodate the flexibility and transparency necessary for carriers to refine their bids to provide vigorous competition. Accordingly, the economic incentives sought may well be frustrated if carriers are so unable to control risks that they may be required to submit less.

competitive offers. Sealist urges, therefore, that adoption of any rule be deferred until the system is completed and tested in a structured side-by-side review.

Sincerely,

Timothy B. Shea

----Original Message--

From: H. Keith Powell

Sent: Thursday, April 07, 2005 3:47 PM

To: 'Scherl, Denise(M/OAA/TC)'; 'Kenneth Martin'; 'Mark Claar'; 'David Liem'; Nelson Randall

(nmrandall@kcc.fsa.usda.gov)

Subject: FBES Presenttion March 31, 2005

Dear All

First I want to thank all of you for taking the time to meet with the Carriers last week. The discussions proved useful in furthering our understanding of the capabilities and inadequacies of FBES as currently designed. So that we are clear on what was discussed on the key issues, I wanted to summarize these points with my comments and some follow-up questions.

The summary points and my comments are as follows:

- 1) Time Line The programming is to be completed in June with internal testing to run from June until December. External testing to be done during the first quarter of 2006 with implementation immediately thereafter.
- 2) As currently designed, the bids entered into FBES will be tied to an individual vessel. This can present difficulties since many Carriers can not pre-select the performing vessel(s) until the quantity, type of cargo, availability dates and discharge ports are known. It was suggested that the bids be fied to a Carrier so that a carrier has the flexibility to use different vessels to lift the offered quantity. As an example a Carrier may wish to use several vessels to lift a given quantity and can only select the vessels after the award has been made. Alternatively, a Carrier may only wish to use one vessel to lift the awarded quantity, but can only make the decision as to which vessel to use after the awarded quantity, discharge ports and commodity availability dates are known.
- 3) The "Constraint Group" feature ties individual bids (vessels) together so that the same vessel can not be contracted twice. In certain circumstances this is important and the constraint (or . subject) should be fied to individual vessels. In other cases the constraint may need to be fied to the bid (not the vessel) as in cases where a Carrier is offering multiple vessels. Another example where a Carrier may need to put a constraint on two or more bids is where there is a capacity limit (other than the vessel capacity). Therefore, I would suggest that the program allow for a constraint to be placed on a bid in addition to the vessel.

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We wish to point out that the above represents our observations and comments based on the recent meetings and our current knowledge of the program. As we continue to study the system, we no doubt will have other questions, suggestions or concerns which we will bring to your attention. FBES represent the most dramatic change to the ocean freight procurement system since the inception of the food assistance programs and we look forward to continuing to work with USDA/AID on this most important project.

We thank you for your review of the above issues and look forward to your response.

Sincerely,

Keith Powell



March 9, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, US Department of Agriculture Rm. 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Re: Proposed Rule on Procurement of Commodities for Foreign Donation

Dear Sir,

These comments are submitted in response to the above referenced proposed rule published by the Commodity Credit Corporation (CCC(in the December 16, 2005 edition of the Federal Register (70 FR 74717-74721). Star of The West Milling Company supplies dry beans to CCC in its export food aid programs and strongly supports the proposal that would require firm, fixed freight availability and rates to be submitted to CCC for use in export food aid commodity purchase evaluations and subsequent freight bookings.

Star of The West Milling agrees that the adoption of this proposal would streamline CCC's procurement process making the actual purchase more cost efficient. These increased efficiencies will result in overall cost saving to the food aid programs. Budget savings that accrue from the implementation of this proposal could be used to purchase more food. This would be beneficial not only for hungry food aid recipients overseas but for homeland security concerns in the U.S. People that have food in their bellies are less likely to become terrorists.

Sincerely,

STAR OF THE WEST MILLING COMPANY

Joseph Cramer



24th Floor | 30 Rockefeller Plaza | New York, NY 10112 212-332-3800 office | 212-332-3888 fax | www.sheppardmullin.com

Writer's Direct Line: 212-332-3825 gmendenhall@sheppardmullin.com

Our File Number: 000F-000013

January 9, 2006

VIA FACSIMILE AND E-MAIL

Commodity Procurement Policy & Analysis Division
Farm Service Agency
U. S. Department of Agriculture (USDA)
Room 5755-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0512

Attention: Mr. Richard Chavez

Re: Proposed Rule for Procurement of Commodities for Foreign

Donation, RIN 0560-AH39, 70 Fed. Reg. 74,717 (Dec. 16, 2005)

Dear Mr. Chavez:

On behalf of TECO Ocean Shipping, Inc. (TECO), we respectfully request a 60-day extension of time from the current deadline of January 17, 2006 to file comments on the above-referenced Proposed Rule.

TECO owns and operates U.S.-flag vessels in the domestic and foreign trades of the United States. When TECO is operating its vessels in the foreign trades, it is primarily transporting cargoes for the Title II, Food for Progress and the McGovern-Dole International Food for Education and Child Nutrition programs. TECO will be affected by the Proposed Rule and believes that the rulemaking raises significant policy issues that could affect the availability of cargoes for its vessels under the cargo preference statutes. Additional requested time will permit TECO to carefully consider the proposed changes and submit substantive comments.

Thank you for your consideration of TECO's request for an additional 60-day extension of time in which to prepare its comments on the Proposed Rule.

Very truly yours,

Greggory B. Mendenhall

Counsel for TECO Ocean Shipping, Inc.





March 9, 2006

VIA ELECTRONIC MAILTO:

Richard.Chavez@USDA.gov

Commodity Procurement Policy & Analysis Division Farm Service Agency U. S. Department of Agriculture (USDA) Room 5755-S 1400 Independence Avenue, S.W. Washington, D.C. 20250-0512

Attention: Mr. Richard Chavez

Proposed Rule for Procurement of Commodities for Foreign Re:

Donation, RIN 0560-AH39, 70 Fed. Reg. 74,717 (Dec. 16, 2005)

Dear Mr. Chavez:

TECO Ocean Shipping, Inc. (TECO), based in Tampa, Florida, owns and operates twelve U.S.-flag vessels in the domestic and foreign trades of the United States. TECO employs in its fleet over 250 American seamen. TECO's ocean-going dry-bulk fleet is the largest, in terms of number and deadweight tonnage, operating under the U.S.-flag today. When TECO is operating its vessels in the foreign trades, it is primarily transporting cargoes for the P.L. 480 Title II, Food for Progress and the McGovern-Dole International Food for Education and Child Nutrition programs. During the past five years, from 2001 through 2005, TECO has transported over 2.0 million tons of food aid cargoes.

TECO supports the U.S. Department of Agriculture's (USDA) efforts to promulgate new procedures and regulations to implement a one-step bid-evaluation process for the procurement of commodities and ocean freight transportation for the above referenced food aid programs. TECO, however, is concerned that USDA's implementation of the one-step bid process, from the current two-step bid process, along with the new computer bid-evaluation system may be subject programmatic errors and procedural problems that will negatively impact USDA's transition to the one-step bid process and the timely delivery of needed food aid cargoes. It is for this reason that TECO urges USDA to implement the one-step bid process first and, after satisfactory operation, then implement the new computer one-step bid-evaluation system. Alternatively, USDA should perform, with industry wide stakeholder participation, a side-by-side test of the manual two-step bid process and the new one-step computer bid-evaluation process, prior to final implementation.

"Performance You Can Count On"



Commodity Procurement Policy & Analysis Division March 9, 2006 Page 2

TECO, is also concerned that a rush to implement the new computer one-step bid-evaluation process may negatively impact USDA's ability to follow the U.S.-flag cargo preference requirements and priority service criteria that is overseen by the Maritime Administration (MarAd). In that regard, TECO understand that MarAd has submitted comments to USDA on its proposed rulemaking and TECO supports MarAd's concerns that USDA's proposed regulations to do address the application of the cargo preference laws. TECO urges USDA to promulgate regulations that insure that the new one-step computer bid-evaluation process will conform with the statutory cargo preference requirements, Specifically, that 75% of the cargoes under the above referenced programs are carried on U.S.-flag vessels, computed separately by vessel type, on a geographic basis as required by section 901(b) of the Merchant Marine Act of 1936, as amended.

With respect to implementation of the regulations and computer bid-evaluation process, TECO is concerned that the USDA's new process will not continue to permit U.S.-flag ocean carriers to link discharge ranges utilizing multiple Kansas City Commodity Office (KCCO) established trade routes. The ability of ocean carriers to bid linked discharge ranges ultimately results in the lowest ocean transportation costs for USDA. The ability for TECO to continue to link discharge ranges allows the company to offers its most competitive rates. This results in the lowest landed cost for both commodities and ocean transportation for USDA.

Finally, TECO is concerned that port designations in the new one-step computer bidevaluation process will include ports that cannot efficiently handle both containerized and bulk food aid cargoes. TECO urges USDA to only designate ports in the new computer bidevaluation process that can efficiently handle and load both containerized and bulk cargoes, so that it may accurately compare the lowest port-to-port transportation cost bids from both liner and break bulk ocean transportation carriers. Ports that do not routinely and efficiently handle and load both containerized and bulk food aid cargoes should be designated as intermodal points, and should not be designated as f.a.s. ports.

TECO looks forward to working with both USDA and KCCO in the transition to the new one-step computerized bid process and appreciate your consideration of our comments on the Proposed Rule.

Very truly yours,

Sal Litrico President

TECO Ocean Shipping, Inc.



January 3, 2006

BY OVERNIGHT DELIVERY

Director
Commodity Procurement Policy &
Analysis Division
Farm Service Agency
United States Department of Agriculture
Room 5755-S
1400 Independence Avenue, SW
Washington, DC 20250-0512

BY FAX AND E-MAIL

Mr. Richard Chavez
United States Department of Agriculture
Fax: (202) 690-2221

E-mail: Richard.Chavez@USDA.gov

Re:

Procurement of Commodities for Foreign

Donation

7 CFR Part 1496, RIN 0560-AH39

Gentlemen:

Transfer Logistics, Inc., Chicago, IL (TLI) and Transfer Logistics Virginia, Inc., Portsmouth, VA (TLV) are companies that provide transload and logistics services to ocean freight carriers and commodity suppliers participating in and in support of the U.S. Government's humanitarian food aid programs. On behalf of my companies I am writing to request a 45-day extension of the January 17, 2006 date established by CCC's notice (70 Fed. Reg. 74717) of a proposed rule to adopt new procedures to be used by CCC in evaluation of bids in connection with the procurement of commodities for donation overseas. That notice was published in the Federal Register of December 16, 2005, immediately prior to the holidays. I have only just become aware of the notice. Although I am sure that the timing of the publication was not intended to cut short the comment period, it certainly has had that effect for me and for other interested organizations in my industry with whom I have been in communication.

As the Federal Register notice identifies, the existing procurement procedures have been in effect "for many years." And while the notice states that the proposed rule has been determined to be "not significant," the background discussion identifies important potential impacts anticipated to result from the adoption of the proposed new procedures, including changes in port allocations and carrier selection. The notice also includes an unexplained reference to the "use of different types of ocean services."

January 3, 2006 Page 2

TLI and TLV believe that the revised procedures contemplated by the proposed rule have wide-ranging implications that require careful evaluation and informed comment, not a hasty response such as that which would be required by the date currently established in the Federal Register notice. We accordingly request that that date be extended for 45 days.

Respectfully,

Steven C. Joseph

President

Transfer Logistics, Inc.

Transfer Logistics Virginia, Inc.

TRANSFER LOGISTICS, INC TRANSFER LOGISTICS VIRGINIA, INC 11401 S GREEN BAY AVE CHICAGO, IL 60617

Transfer Logistics Position Paper
USDA, Commodity Credit Corporation Meeting – February 21, 2006
Procurement of Commodities for Foreign Donation; Public Meeting

My name is Kevin Tunney and I am a representative of Transfer Logistics, Inc. located in Chicago, Illinois and Transfer Logistics Virginia, Inc. located in Portsmouth, Virginia. I would like to take this opportunity to thank The Commodity Credit Corporation and the United States Department of Agriculture for allowing our comments to be heard on the proposed food aid procurement rule changes.

Transfer Logistics' two operations provide trans-loading services of Packaged P.L. 480 Humanitarian Food Aid products that are awarded on a Lake Chicago, Bridge Chicago, FAS Norfolk and Bridge Norfolk award basis. We accept deliveries of commodities primarily by rail and trans-load primarily to ocean freight containers. These services are provided for the commodity supplier, the ocean carrier, or some combination of both depending on location and type of award. Our Chicago operation is the higher volume of the two, and has handled up to 250,000 metric tons per year since 1997. Chicago has directly benefited from the passage of Section 17 of the Maritime Security Act of 1996 that allows up to 25% of Title 2 cargo to be awarded on a lowest landed cost, flag blind basis to a Great Lakes Port. This Act has worked as it was intended to by creating value for the Food Aid Program through lower freight costs as well as by increasing work in the Great Lakes Port Range. The Great Lakes had historically handled large volumes of P.L. 480 cargo until the virtual total loss of US Flag ocean freight service into the Great Lakes in the 1980's. Through Transfer Logistics involvement in the Food Aid program in Chicago there has been extensive job creation both on a direct and indirect basis. Transfer Logistics directly employs between 55 and 65 people in the handling, transloading and administration of Food Aid Cargo. In addition to our direct employment, there has been spin off job creation in numerous support roles including inspection services by SGS with 8 employees, trucking jobs to support the up to 70 loads per day that move out of the facility, and railroad jobs to support the upwards of 4000 rail cars per year that our operation handles. There have been additional jobs created with fumigation contractors as well as maintenance support of the operational equipment.

Transfer Logistics is very concerned about the proposed rule changes relating to how commodities will be purchased in a one step bid system versus the current two step system. While we are in full support of a system that modernizes by lowering manpower requirements, speeding up the turn around time on bids and in theory lowers costs to the program, we are reluctant to sit by and watch a change in procedure without a full and open disclosure of the process. Such a full and open disclosure would need to provide a mechanism such that all interested parties including relevant Government Agencies, Commodity Suppliers, Ocean Carriers and Port Facilities would have the opportunity to weigh in their concerns and then see the exact procedures that will be used to determine

TRANSFER LOGISTICS, INC TRANSFER LOGISTICS VIRGINIA, INC I 1401 S GREEN BAY AVE CHICAGO, IL 60617

bid awards under a new system. These interested parties understand the complexities of the system, and the concern exists that procedural changes including computerized programs to purchase commodities and freight in one step may change the dynamics of how and through which domestic ports that food aid moves. With the massive amount of variable inputs that such a system requires including domestic port points, discharge ports, ocean freights, volume caps and incentives, flagging requirements and Section 17 rules to name but a few it is easy to see how one slight change may cause a major cargo shift. All parties need to clearly see the effects (or non effects) of a new system to ensure that no one party is discriminated against in a new process.

Due to the above issues and concerns, we feel that Commodity Credit Corporation's contention that the proposed rulemaking is "insignificant", thus not warranting a "significant" impact label is an incorrect conclusion. We have been made aware by the industry that to date, certain interested parties, including the United States Maritime Administration (MARAD) and many interested non government participants have been left out of the proposed rulemaking change discussions. We feel that any proposed rulemaking changes related to the Procurement of Commodities for Foreign Donation is a very significant rulemaking change, thus it deserves a full and open review prior to any formal procurement changes taking place.

Once again, Transfer Logistics appreciates the opportunity to be a part of this process, and looks forward to participating in further discussions regarding any changes that may be put into place. Please feel free to contact either myself or Steve Joseph with any questions or for further comments.

Kevin Tunney Transfer Logistics, Inc. Transfer Logistics Virginia, Inc.



March 6, 2006

Director, Commodity Procurement Policy & Analysis Division Farm Service Agency, US Department of Agriculture Rm. 5755-S 1400 Independence Avenue, SW Washington, DC 20250-0512

Re: Proposed Rule on Procurement of Commodities for Foreign Donation

Dear Sir or Madame:

These comments are submitted on behalf of the United States Dry Bean Council (USDBC) to the above referenced proposed rule published by the Commodity Credit Corporation (CCC(in the December 16, 2005 edition of the Federal Register (70 FR 74717-74721). USDBC represents all segments of the US dry bean industry, including growers, shippers, dealers, and canners of all classes of dry edible beans produced in the US. A significant tonnage of several classes of dry beans are procured and utilized annually by CCC in its export food aid programs. The purpose of these comments is to strongly support the change in procurement policy of commodities for foreign donation as outlined by CCC in the proposed rule.

Briefly, the CCC proposal would require firm, fixed freight availability and rates to be submitted to CCC for use in export food aid commodity purchase evaluations and subsequent freight bookings. We agree with CCC that adopting this proposal will streamline CCC's procurement process and allow for more efficient acquisition of food aid commodities. These increased efficiencies will result in overall cost saving to the food aid programs in the commodities that are delivered to overseas destinations. As such, budget savings that accrue from implementing the proposal can be used to procure and deliver more foodstuffs to meet program objectives. Such a result will be beneficial for the programs' hungry overseas recipients, as well as for US growers, processors, exporters, ports, stevedores, transportation entities, and all others involved in making our export food aid programs successful.

USDBC is pleased to support the proposed rule and appreciates the opportunity to submit these comments. Thank you.

Jim Byrum, Chairman USDBC Food Aid Committee

rely

(email comments to Richard.Chavez@USDA.go

(fax comments to: (202) 690-2221)



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Virginia Port Authority 600 World Trade Center Norfolk, Virginia 23510-1679 Telephone (757) 683-8000 Fax (757) 683-8500

J. Robert Bray Executive Director

January 11, 2006

Via Facsimile: (202) 690-2221

Mr. Richard Chavez
Manager, Export Programs
United States Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250-0551

Re:

Procurement of Commodities for Foreign Donation

7 CFR Part 1496, RIN 0560- AH39

Dear Mr. Chavez:

The Virginia Port Authority is a relative new player in the shipments of food aid cargoes and we have worked hard to position our port as a competitive gateway for such shipments. Our success has come under the existing procedure for the procurement of donation commodities. Naturally, we are concerned about the impact of the proposed new procurement procedure on our continued ability to attract these commodities to our port.

We just became aware of the proposed rule change in late December, as published in the Federal Register/Vol. 70, No. 241 on December 16, 2005. Due to the holiday period, we are just now starting to evaluate the potential impact of the proposed change on our port's competitive position for donation commodities. The Federal Register notice specifically mentions possible changes in port allocation as a potential impact of the proposed rule change. We do not feel that the deadline of January 17, 2006, for the receipt of comments provides us with enough time to thoroughly research and evaluate the impact of the proposed rule change on our port's food aid business. Furthermore, this date does not provide us enough time to adequately prepare thorough and meaningful comments to this proposed rule change for the procurement of donation commodities.

January 11, 2006 Page 2

Accordingly, the Virginia Port Authority is requesting a 45-day extension of the January 17, 2006, date established by the Commodity Credit Corporation for the receipt of comments on this proposed rule change.

Yours truly,

J. Robert Bray

Executive Director

EPB



COMMONWEALTH of VIRGINIA

Virginia Port Authority 600 World Trade Center Norfolk, Virginia 23510-1679 Telephone (757) 683-8000 Fax (757) 683-8500

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J Braxton Pawell State Treasprat

March 7, 2006

Via Facsimile: (202) 690-2221

Mr. Richard Chave2 Manager, Export Programs United States Department of Agriculture 1400 Independence Avenue, S.W. Washington, DC 20250-0551

Re:

Procurement of Commodities for Foreign Donation Commodity Credit Corporation, USDA 7 CFR Part 1496, RIN 0560- AH39

Dear Mr. Chavez:

It is the position of the Virginia Port Authority that a change in the current rule for the procurement of donation commodities from a two step bid system to a one step bid system may have a dramatic impact on the port distribution of donation commodities. We do not feel that this proposed rule change has been analyzed and/or explained in enough detail to allow the stakeholders in this business to assess the likely impact on their business level. We would like to see more analysis and testing of the proposed rule change on the port distribution of these commodities before being in a position to support any such change. There has been a significant investment made in both facilities and equipment by industry in our port community to receive and handle these donation commodities. These investments were made to support this business with a long-term focus, and these stakeholder/partners should be allowed to participate in a full and open review prior to the implementation of any procedural change that could significantly impact their business.

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March 7, 2006 Page 2

It is our position that any rule change in the procurement of donation commodities be postponed until completion of thorough testing and determination of the expected changes in commodity port distribution and overall program cost benefits. Only after such an analysis is completed, and the findings are shared, can any port realistically measure the impact of the rule change. We certainly would support a rule change that significantly lowers the costs of the overall donation programs. However, we feel that it is premature to implement the proposed rule change without a determination of the impact to local port business and a thorough analysis of whether such impact, if material, has attendant program cost benefits to justify a material adverse port impact.

Yours truly,

J. Robert Bray

Executive Director

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